

**Digest of rulings of the Court of Justice of the European Union
with relevance to OLAF**

February, 2018

This document is for information purposes only and has no legal value

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INTRODUCTION

This digest is purely informative and has no legal value.

It focusses on court rulings with a relevance to OLAF. Court rulings are relevant either because they mention OLAF, because they have an impact on the protection of the financial interests of the European Union or because they may apply by analogy. Cases where OLAF is specifically mentioned are indicated with an asterisk (*).

It is divided into twelve sections and contains references to over 150 cases. The relevant extract or summary from the case law can be accessed by clicking on the table of contents on the chosen title. Referencing in the text shows the number of the case, part of the title and the numbering of the relevant paragraph(s) in italics, for example *T-29/03 Andalucía* 31-32. This reference is placed above the relevant text and a hyperlink to the full judgment in the Court of Justice website is also included.

Issues covered include (1) OLAF's independence and competence; (2) Cooperation, which deals with various aspects of OLAF's cooperation with others; (3) Procedure, which focusses on procedural rights and guarantees; (4) Access to documents; (5) Confidentiality; (6) Unauthorised disclosures; (7) Whistleblowing; (8) Impartiality and conflicts of interest; (9) Sanctions; (10) Recovery; (11) Damages and (12) Prevention.

Data protection jurisprudence is not included as this information is available elsewhere.

1. OLAF'S INDEPENDENCE AND COMPETENCE

1.1. OLAF's independence

[C-11/00 ECB](#)* 138-159; [C-15/00 EIB](#)* 106-107

The OLAF regulations express the Community legislator's determination to subject the powers conferred on OLAF, first, to guarantees intended to ensure OLAF's complete independence, in particular from the Commission, and, second, to strict observance of the rules of Community law.

Neither the fact that OLAF was established by the Commission and is integrated in its administrative and budgetary structures, nor the fact that the Community legislation has conferred investigative powers on this body, external to the other EC institutions and bodies (ECB), can, as such, undermine the independence of the EC institutions and bodies.

OLAF's investigative function differs in its nature and its objectives from general control tasks such as those of the Court of Auditors and the ECB external auditors.

[T-334/02 VSTKSAP](#)* 39

In view of OLAF's functions and its independence from the Commission, OLAF is not competent to determine what stage the work of the Commission has reached with regard to a third party and even less to commit the Commission in that respect.

Notwithstanding the existence of control mechanisms specific to the various institutions, bodies, offices and agencies established by or on the basis of the Treaties, it was necessary for the purposes of strengthening the prevention of, the fight against fraud, corruption and other irregularities detrimental to the financial interests of the European Community, to set up a control mechanism which is simultaneously centralised within one particular organ, specialised and operated independently and uniformly with respect to those institutions, bodies, offices and agencies.

1.2. OLAF's competence

[T-483/13 Oikonomopoulos](#)* 145-147, 197, 199

In order to make the protection of the financial interests of the Union affirmed in Article 325 TFEU effective, it is imperative that the deterrence and combating of fraud and other irregularities occurs at all levels and in respect of all activities as part of which Union interests may be affected by such phenomena. It is in order best to fulfil that objective that the Commission stated that OLAF should exercise its powers in external administrative investigations.

It is also to that effect that, in actual fact, Article 20 of Regulation No 2321/2002, referred to in paragraph 139 above — which relates to the rules for the participation of undertakings in the implementation of the Sixth Framework Programme — provided that the Commission was to ensure that the financial interests of the Union would be protected by the carrying out of effective checks in accordance with Regulation No 1073/1999. Specifically, that regulation provides that OLAF had the power, conferred on the Commission by Regulation No 2185/96, to carry out checks and inspections in the Member States.

It is thus apparent that the existence of a contractual relationship between the Union and natural or legal persons suspected of illegal activities has no impact on OLAF's investigative power. OLAF may conduct investigations in respect of those persons if they are suspected of fraud or illegal activity, notwithstanding the existence of a contractual relationship between those parties.

Furthermore, no provision of Regulation No 2185/96 or, moreover, of any other regulation prevents the Commission or, in the present case, OLAF from carrying out an on-the-spot check or inspection at a subcontractor's premises without having previously carried out a check or inspection at the premises of the trader suspected of fraud. Provided that it is strictly necessary to establish the existence of an irregularity, OLAF may carry out an on-the-spot check or inspection at the premises of other traders.

In any event, provided the inspections carried out comply with Regulation No 2185/96 the choice of the timing of those inspections is a matter solely for the Commission and OLAF to determine.

[T-166/16 Panzeri](#)* 98

[...] s'agissant du grief pris de ce que le rapport final de l'OLAF n'aurait pas été communiqué au requérant, il suffit de relever que l'article 9, paragraphe 4, du règlement n° 1073/1999 prévoit que le rapport établi à la suite d'une enquête interne et tout document utile y afférent sont transmis à l'institution, à l'organe ou à l'organisme concerné, lequel doit donner à l'enquête les suites, notamment disciplinaires et judiciaires, que ses résultats appellent. En revanche, aucune disposition ne prévoit que le rapport d'enquête soit communiqué à la personne concernée. Il ne saurait donc être reproché à l'OLAF ou au Parlement de ne pas avoir transmis ce rapport au requérant. À cet égard, il convient d'écarter l'argument selon

lequel, dès lors que le Parlement avait reçu le rapport de l'OLAF, aucune exigence de confidentialité ne s'opposait à la transmission de celui-ci. En effet, le fait que le rapport ait été transmis au Parlement et que, le cas échéant, aucune exigence de confidentialité ne subsistait, ne permet pas d'établir l'existence d'une quelconque obligation de transmission dudit rapport au requérant pesant sur l'OLAF ou le Parlement.

[C-209/97 Commission v Council](#) 29

The protection of the financial interests of the Community does not follow from the establishment of the customs union, but constitutes an independent objective which, under the scheme of the Treaty, is placed in Title II (financial provisions) of Part V relating to the Community institutions and not in Part III on Community policies, which includes the customs union and agriculture.

[C-617/10 Åkerberg Fransson](#) 26-27

Given that the European Union's own resources include revenue from application of a uniform rate to the harmonised VAT assessment bases determined according to European Union rules, there is thus a direct link between the collection of VAT revenue in compliance with the European Union law applicable and the availability to the European Union budget of the corresponding VAT resources. It follows that tax penalties and criminal proceedings for tax evasion constitute implementation of Article 325 TFEU.

[C-105/14 Taricco](#) 41

The concept of 'fraud' is defined in Article 1 of the PFI Convention as 'any intentional act or omission relating to ... the use or presentation of false, incorrect or incomplete statements or documents, which has as its effect the misappropriation or wrongful retention of funds from the general budget of the European [Union] or budgets managed by, or on behalf of, the European [Union]'.

The concept therefore covers revenue derived from applying a uniform rate to the harmonised VAT assessment bases determined according to EU rules. That conclusion cannot be called into question by the fact that VAT is not collected directly for the account of the European Union, since Article 1 of the PFI Convention specifically does not lay down such a condition, which would be contrary to that convention's objective of vigorously combatting fraud affecting the European Union's financial interests.

[T-326/13 Thales développement et coopération SAS*](#) 71, 133

il y a lieu de relever que l'enquête menée par l'OLAF ne peut pas être assimilée aux audits financiers prévus dans les contrats Nemecel et Dreamcar et que, par voie de conséquence, cette enquête n'est pas régie par les stipulations contractuelles encadrant lesdits audits. Plus précisément, cette enquête n'est pas régie par l'article 24 de l'annexe II du contrat Nemecel et par l'article 26 de l'annexe II du contrat Dreamcar, ce dernier prévoyant une procédure contradictoire pour le déroulement d'un audit. Il s'ensuit que la prétendue non-communication, en temps utile, du rapport de l'OLAF et du rapport technique ne constitue pas une violation des contrats susmentionnés, ainsi que l'insinue la défenderesse par le biais de son argumentation présentée au point 64 ci-dessus.

S'agissant du premier grief exposé [au point 132 ci-dessus], portant sur l'autorité compétente, au sein de l'OLAF, pour délivrer les mandats, il convient effectivement de noter que, tandis que l'article 6, paragraphe 3, du règlement n° 1073/1999 prévoit que les mandats des agents de l'OLAF qui effectuent une enquête sont délivrés par son directeur, il s'avère que, en l'espèce, ces mandats ont été délivrés par le directeur de la direction B « Enquêtes et Opérations » de l'OLAF. Néanmoins,

sans qu'il y ait besoin de rechercher s'il y a eu en l'espèce une délégation valable du pouvoir de délivrer les mandats, octroyée par le directeur de l'OLAF, au sens de l'article 6, paragraphe 3, du règlement n° 1073/1999, au directeur de sa direction B, il convient de rappeler que, tant en droit français qu'en droit belge, la preuve du dol peut être apportée par tout moyen. Il s'ensuit que, en l'espèce, dans le cas où l'enquête de l'OLAF serait entachée d'une irrégularité formelle, celle-ci n'affecterait pas la recevabilité des auditions des employés du prédécesseur juridique. Le présent grief est dès lors inopérant.

1.3. OLAF's acts and their legal value

[T-29/03 Andalucía*](#) 31-32

The letter from OLAF informing an economic operator that no action could be taken on his complaint about the final report cannot be deemed a decision against which an action for annulment may be brought.

The final report drawn up by OLAF at the end of the external investigation and sent to the competent authorities of the Member States is only a set of recommendations and opinions which have no mandatory legal effects that could impinge on the economic operator's economic interests by altering his legal situation.

[C-60/81 IBM](#) 9

Only measures producing binding legal effects of such a kind as to affect the applicant's interests by bringing about a distinct change in his position constitute acts against which an action for annulment may be brought.

[T-193/04 Tillack*](#) 47 67-70; [F-5/05 and 7/05 Violetti*](#) 90-91

The decision to forward information to the national authorities does not constitute an act adversely affecting an official, as it does not bring a distinct change in the legal position of the person concerned by the information in question.

Article 10(2) of Regulation No 1073/1999 merely provides for the forwarding of information to national judicial authorities, which remain free, in the context of their own powers, to assess the content and significance of that information. They make their own decision whether to take the action or not.

[T-444/07 CPEM*](#) 135

The fact that the enquiry by OLAF uncovered irregularities which had not been detected during an audit carried out by the Commission's Directorate-General for Employment, Social Affairs and Equal Opportunities does not in any way constitute inconsistency and cannot affect the lawfulness of a decision based on the results of that enquiry.

[T-690/13 In vivo*](#) 29

The act that the applicant requested OLAF to adopt, namely the opening of an external investigation, is not a challengeable act and, in any event, the applicant is not directly concerned by that act.

1.4. Duty of care/diligent and impartial examination (sound administration)

[T-309/03 Camós Grau*](#) 104-105

Institutions are subject to the principle of impartiality when carrying out investigative tasks such those entrusted to OLAF, to ensure that the public interest is respected. This protects persons concerned and confers on them a right as individuals to see

that the corresponding guarantees are complied with.

By virtue of the rules which apply to it, OLAF must conduct investigations falling within its competence in compliance with the Treaty and the general principles of Community law, in particular the requirement of impartiality and with the Staff Regulations, Article 14 of which in particular seeks to avoid a situation where there is a conflict of interest on the part of officials.

1.5. Duty to give reasons

[T-34/93 Société Générale](#) 40

To respect the right of defence of undertakings concerned, the Commission has to specify the subject-matter and purpose of the investigation. That obligation is a fundamental requirement not merely in order to show that the investigation to be carried out on the premises of the undertakings concerned is justified, but also to enable those undertakings to assess the scope of their duty to cooperate whilst at the same time safeguarding the rights of the defence.

[F-149/15 HG](#) 90

Le Tribunal rappelle d'emblée que l'obligation de motiver toute décision faisant grief, prévue par l'article 25, deuxième alinéa, du statut, a pour but de fournir à l'intéressé une indication suffisante pour savoir si la décision est bien fondée ou si elle est entachée d'un vice permettant d'en contester la légalité et de permettre au juge de l'Union d'exercer son contrôle sur la légalité de la décision litigieuse.

1.6. OLAF's access to EU staff's computers

[T-74/96 Tzoanos](#) 320

The Commission has a right of access to an official's computer held in his office for the purpose of fulfilling his function, even in the absence of the same official. This access does not violate the rights of the defence.

1.7. OLAF's access to European Parliament premises

[T-345/05 Mote](#) 18-36

Acts of the Parliament which produce or are intended to produce legal effects in regard to third parties or, in other words, acts whose legal effects go beyond the internal organisation of the work of the institution are open to challenge before the Community judicature.

Members, elected as representatives of the peoples of the States brought together in the Community, must, with respect to an act emanating from the Parliament and producing legal effects as regards the conditions under which the electoral mandate is exercised, be regarded as third parties within the meaning of the first paragraph of Article 230 EC.

Although the privileges and immunities have been granted solely in the interests of the Community, the fact remains that they have been expressly accorded to the officials and other staff of institutions of the Community and to the Members. The fact that the privileges and immunities have been provided in the public interest of the Community justifies the power given to the institutions to waive the immunity where appropriate but does not mean that these privileges and immunities are granted to the Community and not directly to its officials, other staff and Members. Therefore the Protocol confers an individual right on the persons concerned, compliance with which is ensured by the right of recourse provided for in Article 230 EC.

A decision by which the Parliament waives the immunity of one of its Members has legal effects going beyond the internal organisation of the Parliament since the decision makes it possible for proceedings to be brought against that Member in respect of the matters identified.

It follows that it must be possible for the Community judicature to review its legality under the first paragraph of Article 230 EC.

The notion of direct concern requires the Community measure complained of to affect directly the legal situation of the individual and leave no discretion to the addressees of that measure, who are entrusted with the task of implementing it, such implementation being purely automatic and resulting from Community rules alone without the application of other intermediate rules.

[C-163/10 Aldo Patriciello](#) 32, 33, 35

It is to be considered that 'opinion' for the purpose of Article 8 of the Protocol must be understood in a wide sense to include remarks and statements that, by their content, correspond to assertions amounting to subjective appraisal.

It is clear too from the wording of Article 8 of the Protocol that, in order to enjoy immunity, an opinion must have been expressed by a Member of the European Parliament 'in the performance of [his] duties', thus entailing the requirement of a link between the opinion expressed and the parliamentary duties.

The connection between the opinion expressed and parliamentary duties must be direct and obvious.

2. COOPERATION

[T-193/04 Tillack](#)* 72 (+ [Application 20477/05 ECHR](#))

The duty of the Member States to cooperate in good faith implies that when OLAF forwards them information pursuant to Article 10(2) of Regulation No 1073/1999, the national judicial authorities have to examine that information carefully and on that basis take the appropriate action to comply with Community law, if necessary by initiating legal proceedings. Such a duty of careful examination does not, however, require an interpretation of that provision to the effect that the forwarded information has binding effect.

[C-2/88 Zwartveld](#) 10, 18-22

The duty to cooperate in good faith imposed on Community institutions and the Commission in particular is of particular importance vis-à-vis the judicial authorities of the Member States, who are responsible for ensuring that Community law is applied and respected in the national legal system. This duty of cooperation requires the Commission to give active assistance where a national court, which is hearing proceedings on the infringement of Community rules, seeks the production of information concerning the existence of the facts constituting those infringements by providing the documents to the national court and authorising its officials to give evidence in the national proceedings, unless the Commission can establish that there are imperative reasons, associated with avoiding interference with the functioning and independence of the Communities, for not doing so.

3. RIGHTS, GUARANTEES AND PROCEDURE

[T-444/07 CPEM](#) 53; [T-210/01 General Electric](#) 632

Rights of the defence can be infringed by reason of a procedural irregularity only in so far as the irregularity has a concrete effect on the ability of the undertakings to defend themselves. Consequently, non-compliance with rules in force whose purpose is to protect the rights of the defence can vitiate the administrative procedure only if it is shown that the latter could have had a different outcome if the rules had been observed.

[T-215/02 Gómez-Reino](#)* 65

OLAF is not obliged to allow a Community official allegedly implicated in an internal investigation access to the documents which are the subject of that investigation, or to those which it has drawn up itself in that connection, before a final decision is made by his appointing authority.

Failure to take account of the rights of defence of an official under investigation, as guaranteed by Article 4 of the inter-institutional agreement constitutes a violation of the substantial formal requirements applicable to the investigation procedure and thereby affects the legality of the final decision of the appointing authority.

[T-48/05 Franchet and Byk](#)* 151, 154, 164

The obligation to seek and obtain the agreement of the Secretary-General of the Commission is not a mere formality that might, in an appropriate case, be complied with at a later stage. The requirement to obtain such agreement would lose its rationale, which is to ensure that the rights of defence of the officials concerned are respected, that OLAF can defer informing them only in truly exceptional cases and that the assessment of that exceptional nature is not a matter solely for OLAF but also requires the assessment of the Secretary-General of the Commission.

Admittedly, Article 4 of Decision 1999/396 confers a margin of discretion on OLAF in cases necessitating the maintenance of absolute secrecy for the purposes of the investigation and requiring the use of investigation procedures falling within the remit of a national judicial authority (see, by analogy, *Nikolaou v Commission*, paragraph 153 above, paragraph 264). However, as regards the procedures for the adoption of the decision to defer informing the officials concerned, OLAF has no discretion. Nor does OLAF have any discretion.

[F-124/05 and F-96/06 A and G](#) 189

The argument that some officials were not the subject of administrative investigations is not such as to establish the deficiencies or the violations of the rights of the defence.

[T-690/13 In vivo](#)* 19

This concerns action concerning non-activity of OLAF consisting in dismissing a case submitted by the applicant. The fact that OLAF considered that it was not competent to perform that investigation and, consequently, did not give the applicant the reply that it sought does not mean that it did not examine the question raised by the applicant or that it did not define its position on the question.

[T-50/00 Dalmine v Commission](#) 83

When the Commission requests information from undertakings which it suspects

have participated in an infringement, it is under no obligation to inform them of the evidence already in its possession. The communication of that information might prejudice the effectiveness of the Commission's investigation in that it would enable the undertakings in question to identify what information was already known to the Commission and therefore what information could still be concealed from it.

[F-23/15 Petrus Kerstens](#)

[..] Examining whether in the absence of such irregularity the procedure could have resulted in the adoption of a different decision, from which would flow the annulment of the disciplinary penalty, the Tribunal concludes that considering the nature of the facts, established on the sole basis of the note of July 20th 2012, as well as the gravity of the breach of the statutory obligations, there is no element in the file which indicates that even if the Appointing Authority had respected the procedural requirements laid down in the GIP 2004, it could have closed the case without imposing any disciplinary penalty on the official.

[T-562/12 Dalli](#) 56

The principle of respect for the rights of the defence is a fundamental principle of EU law. That principle would be infringed where a judicial decision is based on facts or documents which the parties themselves, or one of them, have not had an opportunity to examine and on which they have therefore been unable to comment.

3.1. Right to be heard

[C-432/04 Cresson](#)* 69-72, 94, 104

The third subparagraph of Article 245(2) TFUE specifies the way in which members of the Commission must honour their obligations as members. This should be understood in the broad sense: members must meet the strictest standards of behaviour. However, it does not follow that the slightest deviation from such standards can be censured. The Commission can only refer a case of alleged misconduct of a member to the Court, and it is the Court which decides whether to rule that there has been infringement, and, if so, to impose a penalty.

The right to a fair hearing means that the Commission member against whom the Commission has initiated an administrative procedure under Article 245(2) TFUE must be afforded the opportunity during that procedure to make known his views on the truth and relevance of the facts and circumstances alleged and on the documents used by the Commission to support its claim that there has been an infringement of Community law.

[T-259/03 Nikolaou](#)* 227-234

During an internal investigation OLAF must invite the persons concerned to express their views about the facts. This obligation may be deferred exceptionally in cases requiring absolute secrecy for the purposes of the investigation and requiring the use of means of investigation falling within the competence of a judicial authority.

[F-124/05 and F-96/06 A and G](#) 191

The right of an official to comment on facts concerning him does not mean that the investigators are obliged to amend the conclusions of a report on the basis of the requests made by the official who has been interviewed.

[F-28/14 De Loecker](#) 122-138

The reassignment decision was not sufficient in itself to enable the applicant to fully understand that the AHCC was also contemplating to put an end to its contract,

before the termination date. By not giving the agent the opportunity to present its observations, his right to be heard was not formally respected in violation of Article 41 § 2 a) of the EU Charter of Fundamental Rights. However, his audition prior to the adoption of the termination decision would not have led to a different result.

[T-562/12 Dalli](#) 57

The principle of equality of arms, which is a corollary of the very concept of a fair hearing and the aim of which is to ensure a balance between the parties to proceedings, guaranteeing that any document submitted to the court may be examined and challenged by any party to the proceedings, implies that each party must be afforded a reasonable opportunity to present his case, including his evidence, under conditions that do not place him at a substantial disadvantage vis-à-vis his opponent.

[T-29/15 International Management Group](#)* 76

In those circumstances, contrary to what is claimed, in essence, by the Commission, the fact that the applicant did not bring an action against the precautionary measures cannot have the effect of depriving it of its right to bring an action against the contested decision. Since only an action seeking annulment of the contested decision enables the applicant to contest the legality of measures relating not to the investigation, but to the grant of funds in the context of the Annual Action Programme 2013 in favour of Myanmar/Burma, in view of provisions of the 2012 Financial Regulation, and not those of the OLAF regulation relating to the conduct of investigations, the contested decision contains a new factor, within the meaning of the case-law cited in paragraph 69 above, that the applicant could not in any event have contested by bringing an action for annulment of the precautionary measures.

3.2. Presumption of innocence/Protection of reputation

[T-259/03 Nikolaou](#)* 227-234

In presence of serious allegations affecting the good reputation of an official, the administration must avoid the publication of any allegations which are not strictly necessary.

On the one hand, the administration must avoid giving to the press information which could damage the official and, on the other hand, take all the necessary steps to prevent, within the institution, any form of divulgation of the information which could have a defamatory effect. OLAF violates the rights of defence, in particular the presumption of innocence, when confirming the veracity of certain facts which had already been exposed in the press.

[F-23/05 Giraudy](#)* 161-164

Article 8(2) of Regulation No 1073/1999 defines in a broad way a confidentiality rule applicable to OLAF investigations. This rule must be interpreted as not only aiming to protect the confidentiality of information for gathering the facts, but also to safeguard the presumption of innocence, and therefore the reputation, of the officials or servants concerned with these investigations. The successful performance of an investigation may require keeping it secret towards those persons concerned by the investigation.

Within the Community institutions a culture has developed to react on the concerns of the public to be informed on and ensured of the fact that fraud and other irregularities are identified and, if necessary, eliminated and sanctioned. This challenge implies that the officials holding positions of responsibility within the Commission must take into account the existence of a justified need to communicate certain information to the public.

[F-159/12 CJ](#)* 154 [case under appeal before the General Court: [T-370/15 P](#); [T-395/15 P](#)]

The presumption of innocence is a fundamental right which the European Union Courts must ensure is observed by the institutions. That right is identified in case-law as a general principle applicable to administrative proceedings having regard to the nature of the infringements in question and the nature and degree of severity of the ensuing penalties. It follows that it applies, even in the absence of a criminal prosecution, for an official accused of a breach of his obligations under the Staff Regulations which is sufficiently serious to warrant an investigation by OLAF, in the light of which the administration may adopt any measure it deems necessary, however severe.

3.3. Access to the file

[T-215/02 Gómez-Reino](#)* 65

In the context of OLAF investigations, the right of persons concerned to express their views on all the facts which concern them, as provided for in Article 4 of Commission Decision 1999/396/EC, represents a sufficient guarantee of their right of defence and should not be interpreted extensively, such as to include the right of the person concerned to access to her or his file.

[T-110/15 International Management Group](#)* 36

[...] The legislative framework applicable to OLAF precludes, in principle, a right to access OLAF's file on the part of the persons concerned. It is only if the authorities to whom the final report is addressed intend to adopt acts which adversely affect the persons concerned that those authorities must, in accordance with the procedural rules which apply to them, provide access to OLAF's final report in order to enable those persons to exercise their rights of defence. Consequently, to grant access to OLAF's files or OLAF's final reports to the general public would seriously undermine the system established by Regulation No 883/2013.

3.4. Right to silence

[T-112/98 Mannesmannröhren-Werke](#) 66-67 [Appeal case before the Court of Justice: [C-190/01 P](#)]

There is an infringement to the right to silence whenever the undertaking concerned would be compelled to provide answers which might involve an admission on its part of the existence of an infringement which is incumbent upon the Commission to prove.

3.5. Privileged nature of correspondence between lawyer and client (criminal matters)

[C-305/05 Barreaux](#) 32,36

Lawyers would be unable to carry out satisfactorily their task of advising, defending and representing their clients, who would in consequence be deprived of the rights conferred on them by Article 6 ECHR, if lawyers were obliged, in the context of judicial proceedings by passing them information obtained in the course of related legal consultations.

On the other hand, it must be recognised that the right to a fair trial do not preclude the obligations laid down in Directive 91/308 from being imposed in order to combat money laundering effectively.

3.6. Duration (sound administration)

[F-124/05 and F-96/06 A and G](#)* 147, 390-393

It must be noted that all disciplinary proceedings place the official concerned in a situation of uncertainty about his professional future, inevitably causing him some degree of stress and anxiety. If that uncertainty persists for an inordinate period, the intensity of the stress and anxiety caused to the official goes beyond the level of what may be considered justifiable. Hence, the excessive duration of disciplinary proceedings is to be taken as giving rise to a presumption that the person concerned has suffered non-material damage.

It follows from the principle of sound administration that disciplinary authorities are under an obligation to conduct disciplinary proceedings with due diligence and to ensure that each procedural step is taken within a reasonable time following the previous step. Even in the absence of a limitation period, disciplinary authorities are under an obligation to ensure that proceedings liable to result in a disciplinary measure are instituted within a reasonable period. OLAF may also be liable of the unreasonable duration of disciplinary proceedings as it may be the result both of the conduct of prior administrative investigations and of the disciplinary proceedings themselves.

The reasonableness of the duration of the proceedings must be assessed in the light of the circumstances specific to each case and, in particular, the importance of the case for the person concerned, its complexity and the conduct of the applicant and of the competent authorities.

[T-166/16 Panzeri](#)* 103-104

Cependant, ainsi qu'il a déjà été rappelé, les institutions de l'Union sont tenues d'agir dans un délai raisonnable, dès lors que l'exigence fondamentale de sécurité juridique s'oppose à ce que lesdites institutions puissent retarder indéfiniment l'exercice de leurs pouvoirs et que l'obligation d'observer un délai raisonnable dans la conduite des procédures administratives constitue un principe général du droit de l'Union dont le juge de l'Union assure le respect.

Partant, la procédure devant l'OLAF ne peut pas être prolongée au-delà d'un délai raisonnable, qui doit être apprécié en fonction des circonstances de l'espèce.

3.7. Right to be assisted

[F-124/05 and F-96/06 A and G](#)* 380-381

The duty to provide assistance is concerned with the defence of officials against acts of third parties and of colleagues or hierarchical superiors in their personal capacity and not against acts of the institutions themselves, the review of which falls under other provisions of the Staff Regulations.

OLAF, on the other hand, cannot be held to be a third party in relation to the institution.

[C-229/84 Sommerlatte](#) 20

In principle, it is for the applicant to apply for assistance under Article 24 of Staff Regulations. Only exceptional circumstances may oblige the institution to provide specific assistance not in response to a request from the individual concerned but on its own initiative.

3.8. Right to a reply (sound administration)

[F-5/05 and F-7/05 Violetti](#)* 82

OLAF is obliged to reply to the complaints brought under Article 90a of the Staff Regulation as a situation, in which the author of a contested decision does not comment on the criticism made against that decision, is hardly compatible with the principle of sound administration and reveals the problems to which an absence of clearly affirmed and effective judicial supervision is liable to give rise.

[T-267/03 Roccato](#) 84

Failure to comply with the time-limits established in Article 90 of the Staff Regulation can cause the liability of the institution concerned, in case of damage. On the other hand, it does not affect the validity of the decision in question.

[T-123/99 JT's Corporation](#) 24

Not responding to a request within the prescribed period is considered as an implicit negative decision.

[T-355/04 and T-446/04 Co-Frutta](#) 59, 71-72; [T-44/01, T-119/01 and T-126/01 Vieira](#) 167-170 [Appeal case before the Court of Justice: [C-254/03 P](#)]

OLAF must reply to the confirmatory application within fifteen working days from its registration. This period, in the event of a complex application, can be extended. Factors to be taken into the account are "number of documents requested and diversity of their authors".

None the less, failure to comply with this time-limit does not lead automatically to the annulment of the decision adopted after the deadline. In any event, compensation for any loss resulting from the lateness of the Commission's response may be sought through an action for damages.

3.9. Interaction of criminal and disciplinary proceedings (Article 25 of Annex IX to EU Staff Regulations)

[T-307/01 François](#) 59, 74-75

Article 88(5) of the Staff Regulations establishes the principle that disciplinary proceedings have to await the conclusion of criminal proceedings.

This means that the appointing authority is precluded from giving a final decision on the disciplinary aspect of the case involving the official concerned by adjudicating on facts which are at the same time at issue in criminal proceedings, so long as the decision given by the criminal court has not become final. This prohibition applies equally where the respective legal characterisations of the facts in question in the criminal proceedings and in the disciplinary proceedings are different.

[T-74/96 Tzoanos](#) 35

It is the responsibility of the official concerned to provide the authorising officer with all the facts needed to establish whether the facts concerned by the disciplinary proceedings are also the subject of criminal proceedings against the official.

[F-54/11 BG](#) 56-79

In case F-54/11 the Civil Service Tribunal stated that Article 25 of Annex IX of the EU Staff Regulations had to be interpreted 'restrictively'. This is to ensure that disciplinary procedures can have their intended impact (effet utile). In particular, the

principle in Article 25 should not prevent an EU administration from adopting a disciplinary sanction on the basis of facts that are not contested by the person concerned.

It is possible for a disciplinary procedure to run concurrently with a preliminary enquiry carried out by a national authority, based on the same facts. It is up to the person concerned to give information to the Appointing Authority to enable it to appreciate whether he is being prosecuted and going through a disciplinary procedure at the same time. The facts on which the criminal prosecution is based can then be compared with the facts which led to the disciplinary procedure, in order to determine whether they are identical. It is understood from the ruling that if the facts are found to be identical, the principle in Article 25 applies at this stage, and not before. If the disciplinary procedure ends before the preliminary investigation by a national prosecution authority, it will be up to the national authorities to decide whether to take into account the outcome of the disciplinary procedure. 'Criminal prosecution' is defined in national law and has no independent EU definition.

3.10. Devoir de sollicitude

[F-156/12 McCoy](#) 106

Il ressort d'une jurisprudence constante que la notion de devoir de sollicitude implique notamment que, lorsque l'administration statue à propos de la situation d'un fonctionnaire, elle prenne en considération l'ensemble des éléments susceptibles de déterminer sa décision et que, ce faisant, elle tienne compte non seulement de l'intérêt du service, mais aussi de celui du fonctionnaire concerné. En outre, il convient de souligner que les obligations découlant pour l'administration du devoir de sollicitude sont substantiellement renforcées lorsqu'est en cause la situation d'un fonctionnaire dont il est avéré que la santé, physique ou mentale, est affectée. En pareille hypothèse, l'administration doit examiner les demandes de celui-ci dans un esprit d'ouverture.

4. ACCESS TO DOCUMENTS

4.1. General presumption of inaccessibility

[T-110/15 International Management Group*](#) 29-33

[..] The Court of Justice has acknowledged the existence of general presumptions that access to documents is to be refused in five particular situations, namely in cases concerning: the documents in the administrative file relating to a procedure for reviewing State aid (judgment of 29 June 2010 in *Commission v Technische Glaswerke Ilmenau*, C-139/07P, EU:C:2010:376, paragraph 61); the documents exchanged between the Commission and the notifying parties or third parties in the context of merger control proceedings (judgments of 28 June 2012 in *Commission v Éditions Odile Jacob*, C-404/10 P, EU:C:2012:393, paragraph 123, and *Commission v Agrofert Holding*, C-477/10 P, EU:C:2012:394, paragraph 64); the pleadings lodged by an institution in court proceedings (judgment of 21 September 2010 in *Sweden and Others v API and Commission*, C-514/07P, C-528/07 P and C-532/07 P, EU:C:2010:541, paragraph 94), the documents relating to an infringement procedure during the pre-litigation stage of that procedure (judgment of 14 November 2013 in *LPN and Finland v Commission*, C-514/11 P and C-605/11 P, EU:C:2013:738, paragraph 65); and the documents in a file relating to a proceeding under Article 101 TFEU (judgment of 27 February 2014 in *Commission v EnBW*, C-365/12 P, EU:C:2014:112, paragraph 93).

The General Court has acknowledged the existence of general presumptions in four additional situations, namely in cases concerning: the bids submitted by tenderers in a public procurement procedure in the event that a request for access is made by another tenderer (judgment of 29 January 2013 in *Cosepuri v EFSA*, T-339/10 and T-532/10, EU:T:2013:38, paragraph 101); the documents relating to an 'EU Pilot' procedure (judgment of 25 September 2014 in *Spirlea v Commission*, T-306/12, under appeal, EU:T:2014:816, paragraph 63); the documents sent by the national competition authorities to the Commission pursuant to Article 11(4) of Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles [101 TFEU] and [102 TFEU] (OJ 2003 L 1, p. 1) (judgment of 12 May 2015 in *Unión de Almacenistas de Hierros de España v Commission*, T-623/13, EU:T:2015:268, paragraph 64); and the documents relating to the preparation by the Commission of an impact assessment for developing a policy proposal. (judgment of 13 November 2015 in *Client Earth v Commission*, T-424/14 and T-425/14, under appeal, EU:T:2015:848, paragraph 97).

Notwithstanding the fact that, in most of the cases referred to in paragraph 29 above, the Court of Justice examined the relationships between Regulation No 1049/2001 and another regulation containing specific accessibility rules, and concluded that it was necessary to ensure consistent application of each of those regulations, it nevertheless follows from the case-law that the relationship between two regulations is not the only criterion in order to justify the application of such general presumptions.

The case-law underlines the fact that the *ratio legis* behind the application of such general presumptions is connected with the overriding need to ensure the proper operation of the procedures in question and to ensure that their objectives are not undermined. Accordingly, a general presumption may be recognised on the basis that access to the documents involved in certain procedures is incompatible with the proper conduct of those procedures and that the risk that those procedures could be undermined, on the understanding that general presumptions ensure that the integrity of the conduct of the procedure can be preserved by limiting intervention by third parties (see, to that effect, judgment of 25 September 2014 in *Spirlea v Commission*, T-306/12, under appeal, EU:T:2014:816, paragraphs 57 and 58, and Opinion of Advocate General Wathelet in Joined Cases *LPN and Finland v Commission*, C-514/11 P and C-605/11 P, EU:C:2013:528, points 66, 68, 74 and 76). The application of specific rules provided for by a legal measure relating to a procedure conducted before an EU institution for the purposes of which the documents requested were produced is one of the criteria for recognising a general presumption (see, to that effect, judgment of 11 June 2015 in *McCullough v Cedefop*, T-496/13, not published, EU:T:2015:374, paragraph 91, and Opinion of A. G Cruz Villalón in *Council v Access Info Europe*, C-280/11 P, EU:C:2013:325, point 75).

The Court of Justice's reasoning in those cases must also be applied to OLAF's investigation activities. In other words, generalised access, on the basis of Regulation No 1049/2001, to documents in OLAF's file, while OLAF's investigation procedure is still ongoing, would, in principle, undermine the effective conduct of the investigation. The same is true where the investigation has been recently closed by OLAF.

[T-110/15 International Management Group*](#) 36-37

The legislative framework applicable to OLAF precludes, in principle, a right to access OLAF's file on the part of the persons concerned. It is only if the authorities to whom the final report is addressed intend to adopt acts which adversely affect the persons concerned that those authorities must, in accordance with the procedural rules which apply to them, provide access to OLAF's final report in order to enable those persons to exercise their rights of defence. Consequently, to grant access to OLAF's files or OLAF's final reports to the general public would seriously undermine the system established by Regulation No 883/2013. It follows from all the above considerations

that, for the purposes of interpreting the exception laid down in the third indent of Article 4(2) of Regulation No 1049/2001, it is necessary to recognise a general presumption that the disclosure of documents from the administrative file would, in principle, undermine the protection of the objectives of OLAF's investigation activities. After OLAF has completed its investigation and drawn up its final report, the competent authority still has to determine the follow-up procedure.

[T-110/15 International Management Group*](#) 37

[...] For the purposes of interpreting the exception laid down in the third indent of Article 4(2) of Regulation No 1049/2001, it is necessary to recognise a general presumption that the disclosure of documents from the administrative file would, in principle, undermine the protection of the objectives of OLAF's investigation activities.

[T-110/15 International Management Group*](#) 46

[..] The general presumption also applies to a procedure that has been closed, given that the public interest protected may also be harmed after the OLAF procedure has been closed.

[T-110/15 International Management Group*](#) 66

It must be held that, by applying a general presumption, OLAF did not infringe the principle of sound administration. As has already been noted in the context of the first plea in law, OLAF explained, in the contested decision, why a presumption would apply and extend to all documents concerned by the investigation in order to protect the integrity of the specific sectoral rules adopted by the EU legislature in respect of its activities.

[T-380/08 The Netherlands v EC](#) 42

For the purposes of interpretation of the exceptions set out in the first and third indents of Article 4(2) of Regulation No 1049/2001, it is necessary to acknowledge the existence of a general presumption that the disclosure of documents gathered by the Commission in the context of a proceeding under Article 81 EC undermines, in principle, both the protection of the purpose of inspections, investigations and audits of the institutions of the European Union and the protection of the commercial interests of the undertakings involved in such a procedure.

[T-424/14 and T-425/14 ClientEarth](#) 64-65 [case under appeal before the Court of Justice: [C-57/16 P](#)]

The Court of Justice has acknowledged the existence of general presumptions that access to documents is to be refused in five particular situations, namely in cases concerning: the documents in the administrative file relating to a procedure for reviewing State aid, the documents exchanged between the Commission and the notifying parties or third parties in the context of merger control proceedings, the pleadings lodged by an institution in court proceedings, the documents relating to an infringement procedure during the pre-litigation stage of that procedure and the documents in a file relating to a proceeding under Article 101 TFEU.

The General Court has acknowledged the existence of general presumptions in three additional situations, namely in cases concerning: the bids submitted by tenderers in a public procurement procedure in the event that a request for access is made by another tenderer; the documents relating to an 'EU Pilot' procedure and the documents sent by the national competition authorities to the Commission pursuant to Article 11(4) of Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles [101 TFEU] and [102 TFEU] (OJ 2003 L 1, p. 1).

[C-365/12P EnBW](#) 68; [C-514/11 P - LPN and Finland](#) 48

[..] The recognition that there is a general presumption that the disclosure of documents of a certain nature will, in principle, undermine the protection of one of the interests listed in Article 4 of Regulation 1049/2001 enables the institution concerned to deal with a global application and to reply thereto accordingly.

[C-365/12P EnBW](#) 63

The presumption must operate in relation to documents the disclosure of which is either ruled out or [...] possible only on certain conditions. In other words, the presumption should be fully effective vis-à-vis parties who [...], have no right, in principle, to access the documents [...]; and this must also be the case vis-à-vis parties who have only a limited right of access or a right which is recognised solely for the purposes of safeguarding the right of defence.

[T-221/08 Strack](#)* 91

[Une institution peut se fonder] sur des présomptions générales s'appliquant à certaines catégories de documents, des considérations d'ordre général similaires étant susceptibles de s'appliquer à des demandes de divulgation portant sur des documents de même nature.

L'application d'une présomption générale n'exclut pas la possibilité de démontrer qu'un document donné, dont la divulgation est demandée, n'est pas couvert par ladite présomption ou qu'il existe, en vertu de l'article 4, paragraphe 2, dernier membre de phrase, ou de l'article 4, paragraphe 3, premier ou second alinéas, du règlement 1049/2001, un intérêt public supérieur justifiant la divulgation du document visé. De même, l'institution concernée n'est pas tenue de fonder sa décision sur cette présomption générale. Elle peut toujours procéder à un examen concret des documents visés par la demande d'accès et fournir une telle motivation.

[...] En ce qui concerne les procédures d'enquête interne de l'OLAF au titre du règlement 1073/1999, une présomption générale de non-accès aux documents liés à l'enquête et, plus particulièrement, à ceux contenant des avis destinés à l'utilisation interne dans le cadre de délibérations et de consultations préliminaires au sein de l'OLAF peut résulter, notamment, des dispositions de ce règlement.

[T-221/08 Strack](#)* 92, [EnBW](#) 101

[..] L'exigence imposant de vérifier si la présomption générale en question s'applique réellement ne saurait être interprétée en ce sens que la Commission devrait examiner individuellement tous les documents demandés en l'espèce. Une telle exigence priverait cette présomption générale de son effet utile, à savoir permettre à la Commission de répondre à une demande d'accès globale d'une manière également globale

[T-221/08 Strack](#)* 163

La circonstance qu'un document relatif à une enquête interne de l'OLAF porte une date postérieure à la clôture de l'enquête en question ne saurait pas davantage s'opposer à ce que sa divulgation soit refusée au titre de la présomption générale de refus d'accès, dès lors que ce document est lié à ladite enquête, contient des informations relatives à des avis destinés à l'utilisation interne dans le cadre de délibérations et de consultations préliminaires au sein de l'OLAF et comporte ainsi des informations dont la révélation serait susceptible de compromettre le travail de l'OLAF dans sa mission de combattre la fraude et la corruption.

[T-221/08 Strack](#)* 168, [EnBW](#) 134-135

La présomption générale de refus d'accès susmentionnée implique que les documents couverts par celle-ci échappent à l'obligation d'une divulgation partielle de leur contenu en application de l'article 4, paragraphe 6, du règlement n° 1049/2001.

[T-447/11 Catinis](#) 43, 48

It is open to the institution concerned to base its decisions to refuse access to a document on general presumptions which apply to certain categories of documents, as similar general considerations are likely to apply to requests for disclosure relating to documents of the same nature.

That general presumption does not exclude the possibility of demonstrating that a given document disclosure of which has been requested is not covered by that presumption, or that there is an overriding public interest justifying the disclosure of the document concerned by virtue of the last phrase of Article 4(2) of Regulation No 1049/2001.

Similarly, the institution concerned is not required to base its decision on that general presumption. It may always carry out a specific examination of the documents covered by a request for access and provide appropriate reasons.

It is for the institution which has refused access to a document to provide a statement of reasons from which it is possible to understand and ascertain, first, whether the document requested does in fact fall within the sphere covered by the exception relied on and, second, whether the need for protection relating to that exception is genuine.

[C-139/07 P Ilmenau](#) 61

- Documents in an administrative file concerning procedures for reviewing State aid.

All the documents in the administrative file relating to such a procedure form a single category to which a general presumption that disclosure of documents in the administrative file in principle undermines protection of the objectives of investigations applies.

[C-404/10 P Odile Jacob](#) 123

- Documents exchanged between the Commission and notifying parties or third parties in the context of merger control procedures.

There is a general presumption that disclosure of documents exchanged between the Commission and undertakings during merger control procedures undermines, in principle, both protection of the objectives of investigation activities and that of the commercial interests of the undertakings involved in such a procedure.

[C-514/11 P - LPN and Finland](#) 50, 54, 55

- Pleadings lodged by an institution in proceedings pending before the courts.

It is necessary to bear in mind that that application was made when that infringement procedure was still at the pre-litigation stage and that the procedure had neither been closed by the Commission nor brought before the Court of Justice when the contested decision was adopted.

The first sentence of Article 6(1) of Regulation No 1367/2006, which lays down a rule

intended to facilitate access to documents containing environmental information, provides that that rule does not apply to 'investigations, in particular those concerning possible infringements of Community law'.

It follows that infringement procedures are regarded, by that European Union legislation, as a type of procedure which, as such, has characteristics precluding full transparency being granted in that field and which therefore has a special position within the system of access to documents.

[C-477/10 P Agrofert](#) 68; [C-139/07 P Ilmenau](#) 62

The above-mentioned general presumption does not exclude the possibility of demonstrating that a given document, of which disclosure is sought, is not covered by that presumption or that there is a higher public interest justifying the disclosure of that document under Article 4(2) of Regulation No 1049/2001.

[T-456/13 Sea Handling](#) 58 [case under appeal before the Court of Justice: [C-271/15 P](#)]

Toutefois, ladite présomption a été reconnue comme applicable également lorsqu'un seul document avait fait l'objet d'une demande d'accès.

[C-399/13 P Stichting Corporate Europe Observatory](#) 28-30

The fact that the documents at issue were sent to collective entities — trade associations, in this instance — does not engender a general presumption that those documents were actually intended for a large number of persons.

[T-623/13 UAHE](#) 64, 90

A general presumption does exist according to which the disclosure of documents submitted by a national competition authority in proceedings concerning an infringement of the competition rules may, in principle, undermine the protection of the commercial interests of the undertakings concerned as well as the protection, which is closely linked, of the purposes of the national competition authority's investigation activity. Such presumption applies independently of the question whether the request for access concerns an investigation procedure that is already closed or one that is pending.

.....

For more case-law on access to documents please address the following link:
https://myintracomm.ec.europa.eu/sg/docinter/Documents/table_case_law_access_no_tracks_en.pdf

5. CONFIDENTIALITY AND PROFESSIONAL SECRECY

[T-261/09 P Violetti](#) 63

Article 8(2) of Regulation No 1073/1999 constitutes a confidentiality rule in the field of internal investigations.

In case if, in the breach of this rule, information, forwarded or obtained in the course of internal investigation, are being communicated to persons other than those whose functions require them to know, it can constitute an illegality that can incur liability of the European Union.

[T-236/00 Stauner](#) 60-62

The aim of the Framework Agreement between the Parliament and the Commission is not to limit the right of individual MEPs to put questions to the Commission, but merely to enable the Parliament to exercise wider powers of scrutiny over the Commission's activities by obtaining from that institution confidential information. In that respect, the Commission's discretion in deciding whether to communicate confidential information in its reply to a question put by an MEP acting individually, pursuant to the second paragraph of Article 230 TFUE and in accordance with the relevant provisions of the Parliament's Rules of Procedure, is not governed, even indirectly, by the Framework Agreement.

The Framework Agreement provides for an additional mechanism, which permits, contrary to what would have been the case before the adoption of the Framework Agreement, the forwarding of confidential information to certain parliamentary bodies.

[F-124/05 and F-96/06 A and G](#)* 212-215; [T-48/05 Franchet and Byk](#)* 182-183

It is regrettable if during a popular television programme the document presented in the commentary accompanying the programme's images, as being the minutes of OLAF's interview with the applicant, was broadcast.

Although, Commission itself and OLAF are not the only bodies in possession of the minutes of OLAF's interviews with the applicants and this is why OLAF cannot be best placed to provide evidence enabling the cause of the leak to be established.

Consequently, the exception settled in the case *Franchet and Byk* does not apply in this case and it remains for the applicant to establish that all the conditions of non-contractual liability of the EU, in the consequence of OLAF's actions, have been satisfied.

[F-23/05 Giraudy](#)* 161

Article 8(2) of Regulation No 1073/1999 defines in a broad way a confidentiality rule applicable to OLAF investigations. This rule must be interpreted as not only aiming to protect the confidentiality of information for gathering the facts, but also to safeguard the presumption of innocence, and therefore the reputation, of the officials or servants concerned with these investigations. The successful performance of an investigation may require keeping it secret towards those persons concerned by the investigation.

[T-562/12 Dalli](#) 47, 48

It must be observed that neither the fact that the documents in question may be confidential nor the fact that they may have been obtained unlawfully precludes their remaining in the case-file. First, there is no provision that expressly prohibits evidence obtained unlawfully from being taken into account. Second, the Court of Justice has not ruled out the possibility that even internal documents may, in certain cases, lawfully be placed on the case-file.

In certain situations, it is not necessary for an applicant to show that he has obtained by lawful means the confidential document relied on in support of his action.

The General Court has held, when weighing up the interests to be protected, that it is necessary to consider whether particular circumstances, such as the decisive nature of the production of the document for the purpose of reviewing the lawfulness of the procedure leading to the adoption of the contested measure or of establishing

the existence of a misuse of powers constituted grounds for not withdrawing a document.

[T-198/03 Bank Austria Creditanstalt AG](#) 29

The sphere of information covered by the obligation of professional secrecy extends beyond business secrets of undertakings. A distinction should be drawn, in this respect, between the protection that must be afforded to information covered by the obligation of professional secrecy in relation to persons, undertakings or associations of undertakings having a right to be heard in the context of proceedings applying the competition rules, and that which should be afforded to such information in relation to the general public. The obligation on officials and other servants of the institutions not to disclose information in their possession covered by the obligation of professional secrecy, laid down in Article 287 EC and implemented, in the field of competition rules applicable to undertakings, by Article 20(2) of Regulation No 17, is mitigated in regard to persons on whom Article 19(2) confers the right to be heard. The Commission may communicate to such persons certain information covered by the obligation of professional secrecy in so far as it is necessary to do so for the proper conduct of the investigation. However, that power does not apply to business secrets, which are afforded very special protection. Conversely, information covered by the obligation of professional secrecy cannot be disclosed to the general public, irrespective of whether business secrets or other confidential information are involved.

[T-29/15 International Management Group*](#) 92

It is necessary to reject as unfounded the applicant's argument that the Commission did not inform the applicant of the 'new elements in the file', that it did not provide those elements to the applicant and that it should have provided those elements to the applicant in order to allow it to understand the reasoning for the contested decision. First, as is clear from the Commission's letter of 25 April 2014, and as the Commission confirms in its written pleadings, referring to the existence of 'new elements in the file', it merely indicated that its doubts concerning the applicant's status as an international organisation, resulting from the factors set out in paragraph 85 above, were supported by the new pieces of information or evidence resulting from the investigation. Moreover, it must be noted that the applicant does not dispute that, as the Commission points out, it was required, under Article 10 of the OLAF Regulation, to ensure the confidentiality of the OLAF investigation, with the result that it could not disclose to the applicant the details of new information or evidence resulting from the investigation.

6. UNAUTHORISED DISCLOSURE

[T-259/03 Nikolaou*](#) 216, 264

[...] OLAF must take measures to ensure that no information concerning the OLAF investigations is leaked, given that such a leak constitutes a violation of the personal data protection obligations.

[T-110/15 International Management Group*](#) 67-68

The fact that there may have been an unauthorised leak of information protected by Article 10 of Regulation No 883/2013 does not mean that OLAF's final report was disclosed and entered the public domain within the meaning of Regulation No 1049/2001.

Furthermore, while it is regrettable that a leak might have allowed the German press to obtain confidential information, that does not in itself justify the disclosure of the documents requested in the context of a procedure under Regulation No 1049/2001.

[T-371/03 Le Voci](#) 122-124

The right of access to Council documents may be limited or excluded – according to the principle that a special rule derogates from the general rule (*lex specialis derogat legi generali*) – where there are special rules governing specific matters.

It should be observed that Article 6 of Annex III to the Staff Regulations, adopted on the basis of Article 283 EC, and which specifically lays down the procedure for competitions, provides that '[t]he proceedings of the Selection Board shall be secret'. As the Court of Justice has already had the occasion to point out, that secrecy was introduced with a view to guaranteeing the independence of Selection Boards and the objectivity of their proceedings, by protecting them from all external interference and pressures whether these come from the Community administration itself or the candidates concerned or third parties. Consequently, observance of that secrecy runs counter to divulging the attitudes adopted by individual members of Selection Boards and also to revealing all the factors relating to individual or comparative assessment of candidates.

It follows that the applicant cannot validly rely on the concept of transparency in order to call in question the applicability of Article 6 of Annex III to the Staff Regulations.

7. WHISTLEBLOWING

7.1. The good faith requirement

[F-41/10 Bermejo](#)* 134-138, 150

In order to determine whether an official made honest use of the right of disclosure provided for in Article 22a of the Staff Regulations, the Tribunal must take a certain number of factors under consideration.

First of all, the Tribunal must ascertain whether the information communicated to superiors or, as the case may be, to OLAF direct, related to irregularities which, on the assumption that they were in fact committed, were obviously serious. That is borne out by the fact that Article 22a (1) of the Staff Regulations refers to fraud and corruption as being among the illegal activities communication of which is provided for and adds that such activities must be 'detrimental to the interests of the [Union]'. Likewise, still according to Article 22a (1) of the Staff Regulations, a failure to comply with the obligations of officials can be reported only if it is 'serious'.

The second factor to be taken into consideration is the authenticity or at least the likelihood of the reality of the information disclosed.

An official who complains of irregularities which from his viewpoint fall within the scope of Articles 12a and 22a of the Staff Regulations is required to ensure that the accusations he makes are supported by accurate facts or, at least, that they are founded on a 'sufficient factual basis'. Article 22a of the Staff Regulations is aimed solely at the communication of actual facts which, on an initial assessment, led the official communicating them to form a reasonable presumption of the existence of an illegal activity or a serious breach of obligations. That provision must be reconciled with the obligations of objectivity and impartiality placed on officials, with the obligation to have regard to the dignity of their post and with their duty of loyalty,

and also with the obligation to respect the honour and the presumption of innocence of the persons concerned.

The Tribunal must also take into consideration the means employed by the official in making a disclosure and, with particular respect to irregularities covered by Article 22a(1) of the Staff Regulations, it must ascertain whether the official approached the competent authority or body, namely 'his immediate superior or his Director-General or, if he considers it useful, the Secretary-General, or the persons in equivalent positions, or [OLAF] direct'.

Lastly, the motive of the official who reports illegalities is another factor in the assessment of whether he acted honestly. A denunciation motivated by a personal grievance or animosity or again by the prospect of a personal advantage, in particular a pecuniary advantage, cannot be regarded as being made honestly.

An official who gave wide publicity to accusation by circulating them to Presidents of a Group and other members of the Bureau [where he worked] failed to comply with the obligation to show the greatest prudence and discretion in the publicity given to allegations coming within the competence of OLAF.

[F-77/09 Nijs](#)* 66, 70, 80, 135

The protection of Article 22b (1) may not apply to officials guilty of failures to comply with obligations, such as the breach of the obligation to show the greatest prudence and restraint when giving any publicity to allegations falling within the remit of OLAF.

The Institutions are entitled to expect officials of a certain grade to act with discernment and circumspection.

Accordingly, an official who is the author of defamatory documents, which he has disclosed extensively, is responsible under Articles 17 and 17a of the Staff Regulations. The compulsory resignation of such an official is therefore not disproportionate.

[T-493/09 Y](#)* 62

Supposing that Article 22a is interpreted to mean that an official must take steps to demonstrate the authentic nature of his evidence, this does not however exonerate him from keeping his hierarchy informed of the steps he has taken to do so, in particular when these steps involve investigations likely to have a negative impact on the reputation of the Commission. The official cannot justify these steps on the grounds that he does not trust his hierarchy, since Article 22a(1) expressly provides that an official should inform the Secretary General, or the persons in equivalent positions, or OLAF directly.

[F-88/09 and F-48/10 Z](#) 184

An official who divulged allegations to everyone in his Unit cannot benefit from the protection laid down in Article 22a of the Staff Regulations.

7.2. Protection against retaliation

[F-77/09 Nijs](#) 62; [F-88/09 and F-48/10 Z](#) 253; [F-111/10 AN](#) 86, 90; [F-2/09 Menghi](#) 139

The protection provided in Article 22a, third paragraph, of the Staff Regulations and in Article 2 of Decision 1999/396 is granted without any formalities to official disclosing information related to facts giving rise to the presumption of illegal activity. This protection is granted as a result of such a disclosure. However, this protection does not give the official a protection against all decisions likely to change

his legal position, but only against decisions linked to his disclosure.

[F-41/10 Bermejo](#) 156

Although the Staff Regulations, in particular Article 7, do not expressly provide for the possibility of 'reassigning' an official, it is clear from settled case-law that the institutions have a wide discretion in the organisation of their departments according to the tasks conferred on them and in the assignment, in view of those tasks, of staff who are made available to them, on condition, however, first, that that assignment is carried out in the interests of the service and, second, that the principle of assignment to an equivalent post is respected.

7.3. Harassment

[T-530/12 Bermejo](#) 106

An official who believes he is being harassed is not obliged to disclose the facts relating to his alleged harassment. However, it cannot be excluded that he discloses facts relating to harassment on the basis of Article 22a of the Staff Regulations, as harassment can constitute professional misconduct within the meaning of the same Article.

7.4. Right to confidentiality

[C-145/83 Adams](#) 34

An institution has a duty to respect the anonymity of an informant if he requests that his identity not be revealed. In the case of information supplied on a purely voluntary basis but accompanied by a request for confidentiality in order to protect the informant's anonymity, an institution which accepts such information is bound to comply with such a condition.

7.5. Whistleblowers and OLAF investigations

[T-4/05 Strack](#)* 39, 44, 46, 48

A whistleblower who alleges that irregularities have taken place can under no circumstances oblige OLAF to launch an investigation of the allegations.

The guarantees offered to the whistleblower by Articles 22a and 22b of the Staff Regulations are in no way undermined when OLAF decides to close the investigation opened on the basis of the information received as, under these circumstances, the whistleblower continues to be protected by the same guarantees if he meets the conditions set out in those Articles.

This is because the decision to close an investigation in itself does not make it possible to judge whether the whistleblower reasonably and honestly believed that the information he gave OLAF was true and had thus acted in good faith.

8. IMPARTIALITY AND CONFLICTS OF INTEREST

8.1. Investigator

[*T-309/03 Camós Grau*](#)* 113, 126, 141

The continuing presence and substantial involvement in the investigation of one of OLAF's investigative officers, who was found to have had a conflict of interests, constitutes a serious and manifest breach of the requirement of impartiality. This is a fault capable of giving rise to non-contractual liability on the part of the Community.

8.2. Official

[*T-21/01 Zavvos*](#) 37-40

Les dispositions continues aux articles 11, premier alinéa, et 14 du Statut font peser sur le fonctionnaire une obligation générale d'indépendance et de probité à l'égard de son institution. Elles constituent à ce titre des piliers de la déontologie de la fonction publique communautaire.

Compte tenu de l'importance capitale de la garantie d'indépendance et d'intégrité des fonctionnaires en ce qui concerne tant le fonctionnement interne que l'image extérieure des institutions communautaires, et au vu de la généralité des termes de la disposition de l'article 11, premier alinéa, du statut, la norme de conduite prescrite par ladite disposition doit être comprise comme allant au-delà de l'interdiction pour le fonctionnaire de solliciter ou d'accepter des instructions d'un gouvernement, d'une autorité, d'une organisation ou d'une personne extérieure à son institution.

Elle exige du fonctionnaire qu'il adopte, en toutes circonstances, une attitude guidée exclusivement par les intérêts des Communautés.

Elle prohibe donc, d'une manière générale, tout comportement, lié ou non à une violation d'une réglementation particulière, qui, au vu des éléments de l'espèce, montre que le fonctionnaire concerné a entendu favoriser un intérêt particulier au détriment de l'intérêt général communautaire.

Dans ce contexte, la constatation d'une violation de l'article 11, premier alinéa, du statut en présence d'un manquement à une réglementation donnée suppose qu'il soit démontré ou, du moins, qu'il puisse être raisonnablement considéré, à la lumière des circonstances factuelles de l'affaire, que ledit manquement a été inspiré par la poursuite d'un intérêt autre que les intérêts des Communautés.

L'article 14 du statut requiert du fonctionnaire qu'il informe l'autorité investie du pouvoir de nomination de l'existence d'un intérêt personnel de nature à compromettre son indépendance dans le traitement ou la solution d'une affaire sur laquelle il est appelé à se prononcer.

Eu égard au caractère fondamental des objectifs d'indépendance et d'intégrité poursuivis par cette disposition, et compte tenu de ce que l'obligation prescrite consiste, pour le fonctionnaire concerné, à informer l'AIPN à titre préventif afin que celle-ci puisse prendre les mesures appropriées en fonction du contexte de l'affaire, et non à renoncer d'emblée au traitement ou à la solution de cette affaire ou à écarter, aux fins d'un tel traitement ou d'une telle solution, les éléments pouvant mettre en jeu son intérêt personnel, l'article 14 du statut a un champ d'application large, couvrant toute circonstance dont le fonctionnaire doit raisonnablement comprendre, au vu de la fonction qu'il exerce et des circonstances propres de l'affaire, qu'elle est de nature à apparaître, aux yeux de tiers, comme une source

possible d'altération de son indépendance. Les obligations prévues aux articles 11 et 14 du statut s'imposent de manière objective, en ce sens que la constatation d'un manquement à ces obligations n'est pas subordonnée à la condition que le fonctionnaire concerné ait tiré profit de ce manquement ou que ce dernier ait causé un préjudice à l'institution ou à l'existence d'une plainte d'une personne estimant avoir été lésée par l'attitude du fonctionnaire.

[T-89/01 Willeme](#) 47, 58; [T-137/03 Mancini](#) 29, 31, 33

Aux termes de l'article 14 du statut, le fonctionnaire qui, dans l'exercice de ses fonctions, est amené à se prononcer sur une affaire au traitement ou à la solution de laquelle il a un intérêt personnel de nature à compromettre son indépendance doit en informer l'AIPN. Eu égard au caractère fondamental des objectifs d'indépendance et d'intégrité poursuivis par cette disposition, et compte tenu de ce que l'obligation prescrite consiste, pour le fonctionnaire concerné, à informer l'AIPN à titre préventif, l'article 14 du statut a un champ d'application large. Celui-ci couvre toute circonstance que le fonctionnaire qui est amené à se prononcer sur une affaire doit raisonnablement comprendre comme étant de nature à apparaître, aux yeux de tiers, comme une source possible d'affectation de son indépendance en la matière. Toutefois, l'existence de relations professionnelles entre un fonctionnaire et un tiers ne saurait, en principe, impliquer que l'indépendance du fonctionnaire est compromise ou apparaît comme telle lorsque ce fonctionnaire est appelé à se prononcer sur une affaire dans laquelle ce tiers intervient.

[T-89/01 Willeme](#) 71

L'article 11, premier alinéa, du statut, exige du fonctionnaire qu'il adopte, en toute circonstance, une attitude guidée exclusivement par les intérêts des Communautés et prohibe tout comportement qui, au vu des éléments de l'espèce, dénote la prise en compte, par le fonctionnaire concerné, d'un intérêt autre que l'intérêt communautaire.

[T-157/04 De Bry](#) 33, 34, 38, 39, 43, 44, 46

Eu égard au caractère fondamental des objectifs d'indépendance et d'intégrité poursuivis par l'article 14 du statut, il est de jurisprudence bien établie que cette disposition a un champ d'application large.

Celui-ci couvre toute circonstance dont le fonctionnaire qui est amené à se prononcer sur une affaire doit raisonnablement comprendre qu'elle est de nature à apparaître, aux yeux de tiers, comme étant susceptible d'affecter son impartialité en la matière. Une décision adoptée en violation de ladite exigence d'impartialité et d'intégrité peut être considérée comme étant entachée d'illégalité.

Toutefois, la situation impliquant un risque purement abstrait de conflit d'intérêts dans lequel serait placé, au regard d'une éventuelle promotion, l'évaluateur d'un fonctionnaire du seul fait que les deux fonctionnaires sont classés à un même grade ne suffit pas, en tant que telle, pour conclure qu'un rapport d'évolution de carrière de l'intéressé est établi en violation de l'exigence d'impartialité et d'intégrité prescrite par l'article 14 du statut.

Le pouvoir d'organiser leurs services reconnu aux institutions serait gravement affecté si, afin d'éviter un risque purement abstrait de conflit d'intérêts tel que celui allégué par le requérant, l'administration était obligée de subordonner l'organisation de ses services en matière d'encadrement intermédiaire à des exigences prétendument inhérentes à l'impartialité de la notation en ne formant que des unités dont les chefs occupent un grade plus élevé que celui de leurs subordonnés.

Cela étant, la prévention du risque de conflit d'intérêts en cause doit être conciliée avec le pouvoir d'organisation susmentionné. À cet effet, le système de notation mis

en place par la Commission par les dispositions générales d'exécution de l'article 43 du statut prévoit que l'évaluateur réalise l'évaluation en étroite association avec le validateur et que l'évaluateur et le validateur établissent ensemble le rapport d'évolution de carrière, étant précisé que le validateur a la faculté, à la suite de l'entretien demandé par le fonctionnaire noté, soit de modifier, soit de confirmer le rapport. Le régime prévoyant l'intervention du validateur dans le processus d'évaluation doit être considéré comme une garantie de nature à neutraliser un éventuel risque abstrait de conflit d'intérêts en la personne de l'évaluateur.

[T-118/04 and T-134/04 Caló](#) 246-248

Ne constitue pas une violation de l'article 14 du statut la conduite du chef de cabinet d'un membre de la Commission qui, candidat à un emploi dont la nomination appartient au collège des membres de cette institution, s'abstient de participer à la réunion du groupe de chefs de cabinet qui doit préparer l'adoption de cette décision, y étant remplacé par un autre membre du même cabinet. En effet, ni l'article 14 du statut ni aucune autre règle de droit n'impose que, lorsqu'un fonctionnaire s'abstient de se prononcer sur une affaire au traitement ou à la solution de laquelle il a un intérêt personnel, tous les fonctionnaires placés sous son autorité hiérarchique s'en abstiennent également.

De plus, la seule circonstance que ce fonctionnaire faisait partie d'une instance impliquée dans la préparation de la décision de nomination est sans pertinence et ne permet pas de considérer qu'il aurait été "amené", au sens de l'article 14 du statut, à se prononcer au sujet de l'adoption de cette décision, alors qu'il n'a pas participé à sa préparation et que, en tout état de cause, elle a été adoptée définitivement par le collège de la Commission.

[T-100/04 Giannini](#) 223-224

Conformément à l'article 14 du statut, le conflit d'intérêts ne concerne que la situation où un fonctionnaire est amené, dans l'exercice de ses fonctions, à se prononcer sur une affaire au traitement ou à la solution de laquelle il a un intérêt personnel de nature à compromettre son indépendance.

Lors de l'appréciation d'un risque de conflit d'intérêts, l'existence de relations professionnelles entre un fonctionnaire et un tiers ne saurait, en principe, impliquer que l'indépendance du fonctionnaire est compromise ou apparaît comme telle, lorsque ce fonctionnaire est appelé à se prononcer sur une affaire dans laquelle ce tiers intervient.

Par conséquent, la participation d'un membre d'un jury de concours à l'évaluation d'un candidat travaillant ou ayant travaillé au sein de la même unité ou de la même direction que lui n'amène pas, en soi, ce membre à se prononcer sur une affaire au traitement ou à la solution de laquelle il a un intérêt personnel de nature à compromettre son indépendance.

[F-44/05 Strack](#) 132

L'article 11 bis du statut poursuit les objectifs d'indépendance, d'intégrité et d'impartialité, lesquels ont un caractère fondamental. L'obligation prescrite à son paragraphe 2 consiste, pour le fonctionnaire concerné, à informer l'autorité investie du pouvoir de nomination à titre préventif afin que celle-ci puisse prendre les mesures appropriées en fonction du contexte de l'affaire, et non à renoncer d'emblée au traitement ou à la solution de cette affaire ou à écarter, aux fins d'un tel traitement ou d'une telle solution, les éléments pouvant mettre en jeu son intérêt personnel. Par conséquent, l'article 11 bis du statut a un champ d'application large, couvrant toute circonstance dont le fonctionnaire doit raisonnablement comprendre, au vu de la fonction qu'il exerce et des circonstances propres de l'affaire, qu'elle est de nature à apparaître, aux yeux des tiers, comme une source possible d'altération

de son indépendance.

[F-88/09 and F-48/10 Z](#) 190, 281

En l'absence d'élément permettant de conclure à l'existence d'un conflit d'intérêts, l'existence de relations professionnelles entre le greffier de la Cour de justice et l'époux d'un tiers, voire avec le tiers lui-même, ne saurait suffire à impliquer que son indépendance a été compromise du seul fait qu'il a été appelé à se prononcer sur une affaire concernant indirectement ledit tiers. De même, le fait que ledit greffier a décidé, en sa qualité d'autorité investie du pouvoir de nomination, de l'octroi et de la prolongation des contrats d'emploi dudit tiers, ainsi que d'une sanction disciplinaire envers un fonctionnaire ayant envoyé un courrier électronique au personnel de l'institution concernant ce prétendu conflit d'intérêts, ne permet pas d'établir que la relation professionnelle entre le tiers et lui ait excédé le cadre normal ou qu'il ait adopté une décision de réaffectation dudit fonctionnaire avec l'intention de punir celui-ci pour avoir révélé l'existence d'un prétendu traitement de faveur au bénéfice du tiers.

[F-36/11 BD](#) 68, 70, 80

L'article 11 bis du statut, applicable aux agents contractuels au titre de l'article 3 bis du régime applicable aux autres agents en vertu des articles 11 et 81 du même régime, a pour but de garantir l'indépendance, l'intégrité et l'impartialité des fonctionnaires et agents, ainsi que, par voie de conséquence, celles des institutions qu'ils servent en imposant au fonctionnaire ou à l'agent concerné un devoir d'information préventif de l'autorité investie du pouvoir de nomination ou de l'autorité habilitée à conclure les contrats d'engagement destiné à lui permettre de prendre, le cas échéant, des mesures appropriées.

Eu égard au caractère fondamental des objectifs d'indépendance et d'intégrité poursuivis par cette disposition et au caractère général de l'obligation prescrite aux fonctionnaires et agents, il convient de reconnaître à l'article 11 bis du statut un large champ d'application, couvrant toute situation au vu de laquelle l'intéressé doit raisonnablement comprendre,

compte tenu des fonctions qu'il exerce et des circonstances, qu'elle est de nature à apparaître, aux yeux des tiers, comme une source possible d'altération de son indépendance. A cet égard, l'indépendance des fonctionnaires et agents vis-à-vis des tiers ne doit pas seulement être appréciée d'un point de vue subjectif. Elle suppose aussi d'éviter, particulièrement dans la gestion des deniers publics, tout comportement susceptible d'affecter objectivement l'image des institutions et de saper la confiance que celles-ci doivent inspirer au public.

Par ailleurs, il importe peu que l'institution concernée n'ait subi, par hypothèse, aucun préjudice financier à cause des manquements en cause, car les obligations qui pèsent sur les fonctionnaires et agents en vertu des articles 11 bis et 12 ter du statut tendent aussi à préserver l'indépendance et l'image des institutions.

8.3. Selection Board

[F-155/12 Garcia Dominguez](#) 34, 36, 37

According to case-law, in the assessment of a conflict of interests, the existence of professional relations between an official and a third party cannot, in principle, mean that the official's independence is or appears to be impaired when that official is called upon to decide on a matter in which that third party is involved.

In addition, the principle that the selection board must be impartial requires a member of the board to refrain from taking part in the assessment of a candidate where there is a direct link between the board member and the candidate.

In this connection, admittedly, one of the members of the selection board was the head of a service of a European Institution when the two candidates were employed there. However, it cannot be inferred from this fact that that member of the selection board had a direct link with those two candidates.

Moreover, although several candidates in the competition appear as 'friends' on the 'Facebook' account of two other members of the selection board, that status alone does not show that there are direct links between the members and those candidates. The fact that two persons are 'friends' on that network does not necessarily mean that there is a friendship, in the usual sense of the word, between those persons, but may merely be due to the wish of both those persons to exchange information on topics of general or professional interest. In addition, a person who is a 'friend' of another person does not necessarily have access to all the information published by that person, since each Facebook user may customise the settings for the access which he wishes to grant to his personal data.

8.4. Procurement

[C-538/13 eVigilo](#) 43-47

The third subparagraph of Article 1(1) of Directive 89/665 and Articles 2, 44(1) and 53(1)(a) of Directive 2004/18 must be interpreted as not precluding a finding that the evaluation of the tenders is unlawful on the sole ground that the tenderer has had significant connections with experts appointed by the contracting authority who evaluated the tenders.

The contracting authority is, at all events, required to determine the existence of possible conflicts of interests and to take appropriate measures in order to prevent and detect conflicts of interests and remedy them.

In the context of the examination of an action for annulment of an award decision on the ground that the experts were biased, the unsuccessful tenderer may not be required to provide tangible proof of the experts' bias.

It is, in principle, a matter of national law to determine whether, and if so to what extent, the competent administrative and judicial control authorities must take account of the fact that possible bias on the part of experts had an effect on the decision to award the contract.

Evidence such as the connections between the experts appointed by the contracting authority and the specialists of the undertakings awarded the contract, in particular, the fact that those persons work together in the same university, belong to the same research group or have relationships of employer and employee within that university, if proved to be true, constitutes such objective evidence as must lead to a thorough examination by the contracting authority or, as the case may be, by the administrative or judicial control authorities.

9. SANCTIONS

9.1. European Union competence

[C-240/90 Germany v Commission](#) 22 and 39; [C-375/05 Geuting](#) 39; [C-496/04 Slob](#) 39-41; [C-176/03 Commission v Council](#) 48; [C-440/05 Commission v Council](#) 70, 71

Administrative sanctions: The Community has the power to provide for administrative *penalties* such as exclusions, surcharges etc., which are necessary in order to combat irregularities; those penalties come within the implementing powers

which the Council may delegate to the Commission.

A measure, of which the consequences are the same whether there was unlawful conduct or not, does not seek to penalise an irregularity and thus cannot be classified as a penalty within the meaning of Regulation No 2988/95.

Notwithstanding the Community competence, there is nothing to prevent a Member State from adopting measures beyond those set out in a Community regulation where it may deem them necessary and if the measures set out in the Community regulation are merely minimum requirements. However, national authorities must exercise their discretion in compliance with the general principles of Community law, which include the principles of proportionality, legal certainty and the protection of legitimate expectations.

Criminal sanctions: When the application of effective, proportionate and dissuasive criminal penalties by the competent national authorities is an essential measure for enforcing a Community policy (or at least certain Community policies), the Community may take measures which relate to the criminal law of the Member States which it considers necessary.

By contrast, the determination of the type and level of the criminal penalties to be applied does not fall within the Community's sphere of competence. It follows that the Community legislature may not adopt provisions, which relate to the type and level of the applicable criminal penalties.

9.2. Administrative sanctions

[C-137/85 Maizena](#) 12-14; [C-210/00 Champignon](#) 35 – 44 and 52; [C-354/95 National Farmers' Union](#) 57; [C-236/02 Slob](#) 37; [C-274/04 Man Sugar](#) 15; [C-94/05 Emsland-Stärke](#) 43; [C-367/09 BIR](#) 43

Penalties imposed irrespective of fault are not of a criminal nature. These administrative penalties, however, cannot be imposed unless they rest on a clear and unambiguous legal basis.

They cannot be imposed on the basis of the provisions of Articles 5 and 7 of Regulation No 2988/95 alone since, if, in connection with the protection of the European Union's financial interests, an administrative penalty is to be applied to a category of persons, a necessary precondition is that, prior to commission of the irregularity in question, either the European Union legislature has adopted sectoral rules laying down such a penalty and the conditions for its application to that category of persons or, where such rules have not yet been adopted at European Union level, the law of the Member State where the irregularity was committed has provided for the imposition of an administrative penalty on that category of persons.

[C-304/00 Strawson](#) 52

The application of deterrent and effective penalties in respect of irregularities in applications for aid concerning the years before that in which those irregularities came to light, subject to limitation periods, cannot be considered to be unjustified or disproportionate.

9.3. Non-retroactivity

[C-295/02 Gerken](#) 61; [C-45/06 Campina](#) 33; [C-286/05 Haug](#) 24

The withdrawal of granted funds constitutes an administrative penalty and leads to the retroactive application of a less stringent provision under Article 2(2) of Regulation No 2988/95. This principle does not apply insofar as a provision does not impose a penalty but provides for a basis of calculation for the amounts due.

Equally, there is no retroactive application of a less severe penalty in case of a CAP reform, which is not adopted with the aim of penalising less severely certain irregularities committed under the previous system, but is aimed at adapting those penalties to the new regulatory context resulting from the CAP reform and maintaining the coherence of the system of penalties in the light of the principles underlying the reform.

According to a generally accepted principle and save as otherwise provided, a new rule applies immediately to situations yet to arise and to the future effects of situations which arose under the old rule. On the other hand, it does not normally apply to legal situations that have arisen and become definitive under that old rule. It is otherwise, subject to the principle of the non-retroactivity of legal acts, only if the new rule is accompanied by special provisions which specifically lay down its conditions of temporal application.

It is also settled case-law that rules of procedure apply, in principle, to all proceedings that were pending at the time when they entered into force. It is also otherwise only if the new rule is accompanied by special provisions which specifically lay down its conditions of application over time or according to the degree of progress of the procedures concerned.

However, as was held in the judgment of 8 November 2007, *Andreasen v Commission* to which the parties' attention was drawn in preparation for the hearing, to apply a new procedural rule to a procedure already commenced under the previous procedural rule, and a fortiori to a completed procedure, could have the result, if that procedure must then be recommenced, of giving retroactive effect to the new procedural rule and not simply applying it to an ongoing situation or to the future effects of a situation arising under the previous rule. In such a case, the application of the new procedural rule results in the retroactive annulment of procedures or procedural steps which complied with the rule in force when they were completed.

The principle of the retroactive application of the more lenient law was enshrined, inter alia, in Article 49(1) of the Charter of Fundamental Rights of the European Union, which provides: 'No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national law or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed. If, subsequent to the commission of a criminal offence, the law provides for a lighter penalty, that penalty shall be applicable.'

The competent authorities are required to apply retroactively, to conduct constituting an irregularity, the subsequent amendments made by provisions contained in Union sectoral rules introducing more lenient administrative penalties.

In the event of developments in the rules governing administrative penalties, which would lead to certain aspects of the new rules being more lenient, but in other aspects more stringent than the old rules, it is necessary, in order to determine which is the more lenient rule, not to carry out an abstract analysis, but to determine which, in the specific circumstances, is the most favourable to the undertaking in question, having regard to its situation.

9.4. Proportionality

[C-354/95 National Farmers' Union](#) 53; [C-63/00 Schilling](#) 40; [C-210/00 Champignon](#) 59-68; [C-94/05 Emsland-Stärke](#) 53; [C-143/07 Reuter](#) 17-19, 35; [C-230/06 Militzer](#) 48-51

Given the difficulties involved in proving fraudulent intent, it cannot be considered unjustified or disproportionate to impose a dissuasive and effective penalty or hold someone liable even if the irregularity was committed by error, or in good faith and without fraudulent intent.

9.5. Criminal law sanctions: *Ne bis in idem*

[C-467/04 Gasparini](#) 28-29, 37; [C-436/04 Van Esbroeck](#) 24

Relation of criminal penalties among the Member States: The *ne bis in idem* principle applies also between the Member States in respect of a penal offences even if the accused is acquitted finally because prosecution is time-barred; that principle does not apply to persons other than those whose trial has been finally disposed of. That principle is applicable between the Member States even for acts committed before the entry into force of international *ne bis in idem* rules.

[T-199/99 Sgaravatti](#) 138

Relation of Community and national penalties: The same facts may lead to a penalty imposed at Community and at national level provided one takes into account the other penalty.

[C-489/10 Bonda](#) 27, 28, 37, 46

Article 138(1) of Regulation No 1973/2004 must be interpreted as meaning that the measures provided for in the second and third subparagraphs of that provision, consisting in excluding a farmer from receiving aid for the year in which he made a false declaration of the eligible area and reducing the aid he can claim within the following three calendar years by an amount corresponding to the difference between the area declared and the area determined, do not constitute criminal penalties. According to case-law (see, inter alia, ECHR, *Engel and Others v. the Netherlands*, 8 June 1976, §§ 80 to 82, Series A no. 22, and *Sergey Zolotukhin v. Russia*, no. 14939/03, §§ 52 and 53, 10 February 2009), three criteria are relevant in this respect, i.e. the legal classification of the offence under national law, the very nature of the offence, and the nature and degree of severity of the penalty that the person concerned is liable to incur.

If penalties laid down in rules of the common agricultural policy, such as the temporary exclusion of an economic operator from the benefit of an aid scheme, are not of a criminal nature, it follows that the *ne bis in idem* principle cannot be applied.

[C-617/10 Åkerberg Fransson](#) 34, 35, 37

The *ne bis in idem* principle laid down in Article 50 of the Charter does not preclude a Member State from imposing successively, for the same acts of non-compliance with declaration obligations in the field of VAT, a tax penalty and a criminal penalty in so far as the first penalty is not criminal in nature, a matter which is for the national court to determine (in proceedings under Article 267 TFEU).

In order to ensure that all value added tax revenue is collected and, in so doing, that the financial interests of the European Union are protected, the Member States have freedom to choose the applicable penalties. These penalties may therefore take the form of administrative penalties, criminal penalties or a combination of the two.

It is only if the tax penalty is criminal in nature for the purposes of Article 50 of the Charter and has become final that that provision precludes criminal proceedings in respect of the same acts from being brought against the same person.

9.6. Duty of EU Member States

[C-68/88 Commission v Hellenic Republic](#) 23-25; [C-352/92 Milchwerke](#) 23; [C-2/88 Zwartveld](#) 17

Member States must ensure that infringements of Community law are penalised under conditions, both procedural and substantive, which are analogous to those applicable to infringements of national law and which, in any event, make the penalty effective, proportionate and dissuasive. That obligation also extends to the initiation of any proceedings under administrative, penal, fiscal or civil law for the collection or recovery of duties or charges which have been fraudulently evaded. In this context Member States and the Community institutions have mutual duties of sincere cooperation.

[C-186/98 Nunes and de Matos](#) 14

Even where Community legislation provides for only civil or administrative penalties for conduct harmful to the financial interests of the Community, the Member States have to take all effective measures including criminal penalties.

[C-105/14 Taricco](#) 58, 66

A national rule in relation to limitation periods for criminal offences such as that laid down by the national provisions at issue — which states that the periods, if interrupted, can in no case be extended by more than a quarter of their initial duration (Articles 160 and 161 of the Italian Criminal Code) — is liable to have an adverse effect on the fulfilment of the Member States' obligations under Article 325(1) and (2) TFEU if that national rule prevents the imposition of effective and dissuasive penalties in a significant number of cases of serious fraud affecting the EU financial interests, or provides for longer limitation periods in respect of cases of fraud affecting the financial interests of the Member State concerned than in respect of those affecting the financial interests of the European Union, which it is for the national court to verify.

10. RECOVERY

10.1. Legal position of cigarette manufacturers

[T-377/00, T-379/00, T 380/00, T-260/01 and T-272/01 Philip Morris Int.](#) (upheld on this point by [C-131/03 P Reynolds Tobacco](#)) 79

On a series of actions for annulment of Commission decisions to commence, on behalf of the Community, a number of civil actions in a U.S. District Court (NY) against the cigarette manufacturers for their participation in a system of smuggling and distributing contraband cigarettes in the territory of the EC, the General Court decided to dismiss as inadmissible the manufacturers' applications for annulment of the Commission's decisions. A decision to commence legal proceedings, whether inside the EC or in a third State, does not in itself alter the legal position of the cigarette manufacturer defendants since the contested decisions to launch the action do not produce any binding legal effect.

10.2. Irregularities and abuse of law

[C-110/99 Emsland-Stärke](#) 52-53; [C-515/03 Eichsfelder](#) 39

Abuse of law is regulated by Article 4(3) of Regulation No 2988/95. A *finding that there is an abuse presupposes*: first, a combination of objective circumstances in which, despite formal observance of the conditions laid down by the Community rules, the purpose of those rules has not been achieved, and second, a subjective element consisting in the intention to obtain an advantage from the Community rules by creating artificially the conditions laid down for obtaining it;

it is for the national court to verify the existence of an alleged abuse of law in accordance with the rules of evidence of national law. An abuse entails the obligation to reimbursement and is not in conflict with the principle of lawfulness.

10.3. Limitation period

[C-566/14 P Marchiani](#)* 107-108

The Parliament wishes to obtain reimbursement from the appellant of an additional amount which was paid to him on the basis of the parliamentary assistance allowance, over and above the amount already reclaimed by the Secretary-General's decision of 4 March 2009 to claim reimbursement. That additional claim for reimbursement was made following the submission, on 14 October 2011, of the OLAF Report, which indicates that none of the appellant's three assistants carried out the work of a parliamentary assistant. In those circumstances, the Court considers that the Parliament was, in the present case, in a position in normal circumstances to claim its debt, in the sense of paragraph 103 above, at the date when that report was submitted. Since the debit note at issue was issued by the Parliament on 5 July 2013, the period within which the debit note was communicated to the appellant cannot be regarded as being unreasonable.

The General Court was correct to find, and did not thereby err in law, that the Parliament, in adopting the decision at issue and the debit note at issue, was not in breach of its obligations under the reasonable time principle, in the light of the facts of the case, in particular those relating to the conduct and diligence of the EU institution in its management of the procedure that led to the adoption of that decision and that debit note.

[C-278/02 Handlbauer](#) 30-34; [C-226/03 P Martí Peix](#) 18

The limitation period of Article 3(1) of Regulation No 2988/95 is applicable to the irregularities leading to both administrative measures and penalties. It starts from the end of the irregularity.

[C-278/02 Handlbauer](#) 41-43; [C-226/03 P José Martí Peix](#) ([T-125/01 José Martí Peix](#)) 92 - 94; [C-279/05 Vonk](#) 44

A notification to the concerned economic operator interrupts the limitation period only if the suspected irregularities are sufficiently precisely defined. This is the case in a Commission (OLAF) letter seeking to investigate irregularities.

An irregularity is continuous or repeated where it is committed by a Community operator who derives economic advantages from a body of similar transactions which infringe the same provision of Community law. The fact that the irregularity relates to a relatively small proportion of all the transactions carried out in a given period and that the transactions in which the irregularity has been detected always concern different consignments is immaterial in this respect.

[C-59/14 Kollmer](#) 29, 33

In circumstances where the infringement of a provision of EU law was discovered only after the occurrence of a prejudice, the limitation period begins to run from the time when both the economic operator's act or omission that infringed EU law and the prejudice caused to the budget of the European Union or budgets managed by it have occurred.

Article 1(2) of Regulation No 2988/95 must be interpreted as meaning that, in circumstances such as those at issue in the main proceedings, a prejudice occurs as soon as the decision to grant the export refund to the exporter concerned has been made.

[C-52/14 Pfeifer & Langen](#) 56, 69, 74

In order to be regarded as a 'repeated irregularity' within the meaning of the second subparagraph of Article 3(1) of Regulation No 2988/95, it is required only that the period between each irregularity be shorter than the limitation period of four years provided for in the first subparagraph of Article 3(1).

In the case of a continuous or repeated irregularity the limitation period begins to run from the day on which the irregularity ceased, irrespective of the date on which the national administration became aware of that irregularity.

Acts relating to investigation or legal proceedings adopted by the competent authority and notified to the person in question do not have the effect of interrupting the limitation period laid down in the fourth subparagraph of Article 3(1).

[C-62/06 Zefeser](#) 26

The classification of an act as 'an act that could give rise to criminal court proceedings' which allows the post-clearance recovery of import duties even beyond the limitation period set out in the Customs legislation, falls within the competence of the customs authorities required to determine the exact amount of the import duties or export duties in question.

[T-375/05 Le Canne](#) 79, 82

Par ailleurs, le principe général de droit communautaire du délai raisonnable doit être respecté dans le cadre des procédures administratives. Subordonner la prescription de l'instruction ou des poursuites, par la Commission, d'une irrégularité affectant l'exécution d'un projet à la clôture définitive, par cette même institution, du programme pluriannuel concerné, conduirait à la prorogation du délai de prescription en violation du principe général du délai raisonnable.

[C-131/10 Corman](#) 54-55; [C-278/07 to C-280/07 Hauptzollamt Hamburg](#) 45

Under the derogation provided for in Article 3(3) of Regulation No 2988/95, Member States retain wide discretion in fixing longer limitation periods which they intend to apply in cases involving an irregularity that is detrimental to the European Union's financial interests. Although, this Regulation does not provide for any information or notification process relating to the use made by Member States of their possibility of providing for longer limitation periods.

Thus, no form of monitoring has been provided for at European Union level as regards either the limitation periods applied by way of exception by Member States under that provision or the sectors in which Member States have decided to apply those periods.

Article 85b of the Implementing Regulation sets the starting point for the limitation period as the deadline notified to the debtor in the debit note, that is to say, in the act by which the determination of the debt by the authorising officer is brought to the notice of the debtor and by which he is informed of the final date for payment, in accordance with Article 78 of the Implementing Regulation.

Having regard to Article 73a of the Financial Regulation, the period in which a debit note is communicated must be presumed to be unreasonable where that communication takes place outside a period of five years from the point at which the institution was, in normal circumstances, in a position to claim its debts. Such presumption cannot be overturned unless the institution in question establishes that, despite the efforts which it has made, the delay in acting was caused by the debtor's conduct, particularly time-wasting manoeuvres or bad faith. In the absence of such proof, it must therefore be held that the institution has failed to fulfil the obligations on it under the reasonable period principle.

Article 3(1) of Regulation No 2988/95 must be interpreted as meaning that the limitation period for an irregularity committed in the context of a 'multiannual programme', such as the project at issue in the main proceedings, runs from the date on which the irregularity in question was committed, in accordance with the first subparagraph of Article 3(1) of Regulation No 2988/95; if the irregularity is 'continuous or repeated', the limitation period runs from the day on which the irregularity ceases, in accordance with the second subparagraph of Article 3(1) of Regulation No 2988/95. In addition, a 'multiannual programme' is regarded as 'definitively terminated', within the meaning of the second sentence of the second subparagraph of Article 3(1) of Regulation No 2988/95, on the end date provided for in respect of that programme, in accordance with the rules which govern it. In particular, a multiannual programme governed by Regulation No 1164/94 must be regarded as being 'definitively terminated', within the meaning of that provision, on the date indicated in the Commission decision approving that project as the deadline for completion of the work and for the making of the payments of the eligible expenditure related thereto, without prejudice to any extension, by a new decision of the Commission to that effect.

The second subparagraph of Article 3(1) of Regulation No 2988/95 mean that the fact that an operator is liable for claims for interest, such as those at issue in the main proceedings, does not constitute a 'continuous or repeated irregularity' within the meaning of that provision. Such claims must be regarded as resulting from the same irregularity, within the meaning of Article 1(1) of Regulation No 2988/95, as that giving rise to the recovery of the aid and amounts wrongly received, constituting the principal claims.

The first subparagraph of Article 3(1) of Regulation 2988/95 must be understood as meaning that, as regards proceedings resulting in the adoption of administrative measures for the recovery of claims for interest, such as those at issue in the main proceedings, the limitation period laid down in the first subparagraph of Article 3(1) starts to run from the date on which the irregularity which gives rise to the recovery of the aid and amounts not due, on the basis of which that interest is calculated, was committed, that is, on the date of the factor constituting that irregularity, namely, either the date of the act or omission or the date of the prejudice, which occurs last.

The fourth subparagraph of Article 3(1) of Regulation No 2988/95 must be interpreted as meaning that, as regards proceedings resulting in the adoption of administrative measures for the recovery of interest, such as those at issue in the

main proceedings, limitation becomes effective on the expiry of the period laid down in the fourth subparagraph of Article 3(1), when within that period the competent authority, while having sought recovery of the aid or amounts wrongly received by the operator concerned, has not adopted a decision regarding that interest.

Article 3(3) of Regulation No 2988/95 must be interpreted as meaning that a limitation period laid down under national law, which is longer than that laid down in Article 3(1) of that regulation, may be applied, in a situation such as that at issue in the main proceedings, as regards the recovery of claims arising before the date on which that period entered into force, not yet time-barred under Article 3(1).

[C-42/17 M.A.S.](#) 39, 41, 59, 62

It is for the competent national courts to give full effect to the obligations under Article 325(1) and (2) TFEU and to disapply national provisions, including rules on limitation, which, in connection with proceedings concerning serious VAT infringements, prevent the application of effective and deterrent penalties to counter fraud affecting the financial interests of the Union.

It is primarily for the national legislature to lay down rules on limitation that enable compliance with the obligations under Article 325 TFEU, in the light of the considerations set out by the Court in paragraph 58 of the *Taricco* judgment. It is that legislature's task to ensure that the national rules on limitation in criminal matters do not lead to impunity in a significant number of cases of serious VAT fraud, or are more severe for accused persons in cases of fraud affecting the financial interests of the Member State concerned than in those affecting the financial interests of the European Union.

It is for the national court to ascertain whether the finding, required by paragraph 58 of the *Taricco* judgment, that the provisions of the Criminal Code at issue prevent the imposition of effective and deterrent criminal penalties in a significant number of cases of serious fraud affecting the financial interests of the Union leads to a situation of uncertainty in the Italian legal system as regards the determination of the applicable limitation rules, which would be in breach of the principle that the applicable law must be precise. If that is indeed the case, the national court is not obliged to disapply the provisions of the Criminal Code at issue.

Article 325(1) and (2) TFEU must be interpreted as requiring the national court, in criminal proceedings for infringements relating to VAT, to disapply national provisions on limitation, forming part of national substantive law, which prevent the application of effective and deterrent criminal penalties in a significant number of cases of serious fraud affecting the financial interests of the Union, or which lay down shorter limitation periods for cases of serious fraud affecting those interests than for those affecting the financial interests of the Member State concerned, unless that disapplication entails a breach of the principle that offences and penalties must be defined by law because of the lack of precision of the applicable law or because of the retroactive application of legislation imposing conditions of criminal liability stricter than those in force at the time the infringement was committed.

10.4. Principle of legality

[C-295/02 Gerken](#) 56

In Regulation No 2988/95, the Community legislator set out some general principles that all the sectoral regulations must comply with. One of these is the principle of the retroactive application of less severe administrative penalties.

[C-158/06 Stichting](#) 34

Where the conditions for the grant of financial assistance by the Community to

a Member State are set out in the grant decision but that Member State has neither published them nor made them known to the ultimate beneficiary of the assistance, it is not contrary to Community law to apply the principle of legal certainty so as to preclude repayment by that beneficiary of the amounts wrongly paid, provided that it is possible to establish the beneficiary's good faith. In such a case, the Member State concerned may be held financially liable for the amounts not recovered in order to give effect to the Community's right to obtain repayment of the amount of the assistance.

[C-383/06 to C-385/06 VNOSW](#) 38-40

In the area of Structural Funds Article 23(1) of Regulation No 4253/88 is the relevant legal basis for the obligation to recover and not Regulation No 2988/95 which merely lays down general rules.

The exercise of any discretion to decide whether or not it would be expedient to demand repayment of Community funds unduly or irregularly granted would be inconsistent with the duty imposed on national administrations by Article 23(1) of Regulation No 4253/88.

10.5. Non-performance of contractual obligations

[T-154/14 ANKO](#) 92, 124; [T-771/14 ANKO](#) 64

La Commission est donc fondée à soutenir que la requérante a violé une obligation financière stipulée dans les conventions de subvention en cause, dans la mesure où elle n'a pas été en mesure de produire, lors de l'audit financier, des relevés de temps de travail fiables pour justifier les coûts de personnel déclarés. Le non-respect de cette obligation est un motif suffisant pour rejeter l'ensemble de ces coûts.

En effet, il y lieu de rappeler que la Commission est liée, en vertu de l'article 317 TFUE, par l'obligation de bonne et saine gestion financière des ressources de l'Union. Dans le système d'octroi de subventions de l'Union, l'utilisation de ces subventions est soumise à des règles qui peuvent aboutir à la restitution partielle ou totale d'une subvention déjà octroyée. Le bénéficiaire d'une subvention dont la demande a été approuvée par la Commission n'acquiert donc, de ce fait, aucun droit définitif au paiement intégral de la subvention s'il ne respecte pas les conditions auxquelles le soutien était subordonné.

Par ailleurs, selon la jurisprudence, l'exigence de produire des relevés de coûts prétendument éligibles en bonne et due forme n'a d'autre objectif que de permettre à la Commission de disposer des données nécessaires afin de vérifier si les fonds de l'Union ont été utilisés en conformité avec les stipulations du contrat (voir, en ce sens, arrêt du 22 mai 2007, Commission/IIC, T-500/04, EU:T:2007:146, point 95 et jurisprudence citée).

[T-217/01 Forum des migrants](#) 44, 58

Applicants for and beneficiaries of Community financial aid have an obligation to provide information and to act in good faith, and are thus required to satisfy themselves that they are submitting reliable information to the Commission. The Commission can terminate a grant agreement if the beneficiary gives incomplete information in order to obtain payment of the grant.

[T-29/02 GEF](#) 73

The jurisdiction of the General Court to deal with an action based on an arbitration clause necessarily implies jurisdiction to deal with a counterclaim made by an institution in the context of the same action which derives from the contractual relationship or the situation on which the main application is based or has a direct

link with the obligations deriving there from.

10.6. Customs

[C-407/16 'Aqua Pro' SIA](#)* 59, 66, 88

Although the information contained in an OLAF report counts among the evidence to be taken into consideration in order to establish whether the conditions for an importer to rely on a legitimate expectation under Article 220(2) (b) of the Customs Code are satisfied, such a report may, in the light of the information that it contains, prove to be insufficient for the purposes of establishing to the requisite legal standard whether those conditions are actually satisfied in all respects.

Article 220(2)(b) of the Customs Code must be interpreted as meaning that it is for the referring court to ascertain, in the light of all the specific evidence in the case in the main proceedings, and in particular of the evidence adduced by the parties in those proceedings for that purpose, whether the conditions for an importer to rely on a legitimate expectation under that provision are satisfied. For the purpose of that assessment, priority is not to be given to information obtained in a subsequent check over that contained in an OLAF report.

Article 875 of Regulation No 2454/93, as amended by Regulation No 1335/2003, must be interpreted as meaning that a Member State is bound, under the conditions specified by the European Commission pursuant to that article, by the findings of a European Commission decision adopted under Article 873 of that regulation, as amended by Regulation No 1335/2003, in respect of another Member State in cases involving comparable issues of fact and of law, which it is for its authorities and courts to ascertain by taking into account, inter alia, the information on the conduct of the exporter or that of the customs authorities of the exporting State as stated in the European Anti-Fraud Office (OLAF) report on which the decision is based.

[C-593/15 P and C-594/15 P Slovak Republic v European Commission](#) 46-47

According to consistent case-law, any provisions adopted by the institutions of the European Union, whatever their form, which are intended to have binding legal effects, are regarded as 'actionable measures', within the meaning of Article 263 TFEU.

To ascertain whether or not a contested measure produces such effects, it is necessary to look to its substance. Those effects must be assessed in accordance with objective criteria, such as the contents of that measure, taking into account, as appropriate, the context in which it was adopted and the powers of the institution which adopted the measure.

[T-466/14 Kingdom of Spain v European Commission](#) 92, 108

It is therefore necessary to determine whether the person liable qualifies under the rule set out in the second subparagraph of Article 220(2)(b) of the CCC, according to which the error is presumed to be not reasonably capable of detection for the purposes of the first subparagraph where the issue of an incorrect certificate by the authorities of a non-member country takes place in the context of an arrangement whereby the preferential status of goods is established on the basis of a system of administrative cooperation involving those authorities. This rule is thus linked to the first subparagraph of Article 220(2)(b) of the CCC, by providing that, in the specific case where an incorrect certificate of origin is issued, there is a legal presumption that the error is not detectable.

As regards the condition relating to the good faith of the person liable, it is apparent from the fourth subparagraph of Article 220(2)(b) of the CCC that the person liable may plead good faith when he can demonstrate that, during the period of the trading

operations concerned, he has taken due care to ensure that all the conditions for preferential treatment have been fulfilled.

[T-752/14 Combaro SA](#) 39, 102

Il ressort du libellé de l'article 905 du règlement d'application que le remboursement des droits à l'importation est subordonné à la réunion de deux conditions cumulatives, à savoir, premièrement, l'existence d'une situation particulière et, deuxièmement, l'absence de négligence manifeste et de manœuvre de la part de l'intéressé. En conséquence, il suffit que l'une des deux conditions fasse défaut pour que le remboursement des droits à l'importation doive être refusé.

À cet égard, il y a lieu de rappeler la jurisprudence constante selon laquelle, pour apprécier l'existence d'une négligence manifeste au sens de l'article 239 du CDC, il faut tenir compte, notamment, de la complexité des dispositions dont l'inexécution a fait naître la dette douanière, ainsi que de l'expérience professionnelle et de la diligence de l'opérateur en question.

[C-23/04 to C-25/04 Sfakianakis](#) 21, 49

Customs authorities of an EC Member State need to accept and to comply with the decisions (e.g. on the validity of an EUR 1 certificate) taken by the authorities of a third country on the basis of a protocol on administrative cooperation between customs authorities; provided that the cooperation under the protocol is founded both on the division of responsibilities (between MS and third countries authorities) and on mutual trust between the authorities concerned.

[C-12/92 Huygen](#) 27-28

The EC Member States' authorities also have to accept the results of an inquiry by the third country's authority into the validity of a EUR 1 certificate undertaken on the request of the Member State's authorities. This means that the third country's decision can only be challenged if the customs authorities of the third state have not been in a position to carry out the subsequent verification properly and it has then been carried out by the importing Member State.

The obligation of acceptance of third countries' decisions is not limited to administrative acts but also includes judicial decisions on the legality of administrative decisions delivered by the third country authorities.

[C-222/84 Johnston](#) 18-19

The failure to accept judicial decisions would affect the exporter's right to an effective judicial remedy which is a general principle of EC law.

[C-204/07 P C.A.S.](#) 95, 106-111

It is the task of the Commission to satisfy itself, in the supervising and monitoring the proper implementation of the Association Agreement, that the third country's authorities correctly classify the certificates (A.TR.1) as either irregular or inauthentic.

[C-153/94 and C-204/94 Faroe Seafood](#) 24-25

In the case of preferential treatment of goods originating in a third country on the basis of a unilateral Community measure such as a regulation, decisions taken by the authorities of the non-member State cannot bind the Community and its Member States in their interpretation of the Community legislation.

Determinations made by the Commission as to the origin of goods in the light of a

mission of enquiry must take precedence over the determinations of the customs authorities of the exporting non-member State.

10.7. VAT

[C-42/17 M.A.S.](#) 35

The Member States, if they are not to disregard their obligations under Article 325(1) and (2) TFEU, must ensure that, in cases of serious fraud affecting the EU's financial interests in relation to VAT, criminal penalties that are effective and deterrent are adopted.

[C-105/14 Taricco](#) 36-37, 39-40

In relation to VAT, it follows from Directive 2006/112, read in conjunction with Article 4(3) TEU, that Member States are not only under a general obligation to take all legislative and administrative measures appropriate for ensuring collection of all the VAT due on their territory, but must also fight against tax evasion.

Article 325 TFEU obliges the Member States to counter illegal activities affecting the financial interests of the European Union through effective deterrent measures and, in particular, obliges them to take the same measures to counter fraud affecting the financial interests of the European Union as they take to counter fraud affecting their own interests.

Although the Member States have freedom to choose the applicable penalties — which may take the form of administrative penalties, criminal penalties or a combination of the two — in order to ensure that all VAT revenue is collected and, in so doing, that the financial interests of the European Union are protected in accordance with the provisions of Directive 2006/112 and Article 325 TFEU.

It must be recalled that, under Article 2(1) of the PFI Convention, the Member States are to take the necessary measures to ensure that conduct constituting fraud affecting the European Union's financial interests is punishable by effective, proportionate and dissuasive criminal penalties, including, at least in cases of serious fraud, penalties involving deprivation of liberty.

[C-419/14 WebMindLicenses Kft.](#) 39-40, 92

The differences between the standard rates of VAT applied by the Member States result from the absence of full harmonisation by the VAT Directive, which sets only the minimum rate.

Accordingly, enjoyment in a Member State of a standard rate of VAT lower than the standard rate in force in another Member State cannot be regarded in itself as a tax advantage the grant of which is contrary to the objectives of the VAT Directive.

EU law must be interpreted as meaning that, if an abusive practice is found which has resulted in the place of supply of services being fixed in a Member State other than the Member State where it would have been fixed in the absence of that abusive practice, the fact that value added tax has been paid in that other Member State in accordance with its legislation does not preclude an adjustment of that tax in the Member State in which the place where those services have actually been supplied is located.

[C-354/03, C-355/03 and C-484/03 Optigen](#) 55

In the case of business transactions that are part of a chain of supply, economic operators may only be held liable for tax fraud if they had knowledge or means of knowledge of their direct or indirect involvement in the fraud scheme.

Member States' tax authorities may not refuse businesses reimbursement/deduction of input tax following transactions which are preceded by VAT fraud when the taxable person effected the relevant transactions without knowing or having any means of knowledge of the fraudulent nature of another transaction in the supply chain.

[C-384/04 FTI](#) 35

A taxable person to whom a supply of goods or services has been made and who knew, or had reasonable grounds to suspect, that some or all of the value added tax payable in respect of that supply, or of any previous or subsequent supply, would go unpaid may be made jointly and severally liable for the tax losses. However, national rules containing this liability rule have to comply with the principles of legal certainty and proportionality.

10.8. Structural funds

[C-388/12 Comune di Ancona](#) 29, 33, 42

Article 30(4) of Council Regulation (EC) No 1260/1999 of 21 June 1999 laying down general provisions on the Structural Funds must be interpreted as meaning that the modifications referred to in that provision include, not only those that take place during the performance of a project, but also those that take place afterwards, in particular in the course of the project's management, provided that those modifications take place within the five-year period specified in that provision.

Article 30(4) of Regulation No 1260/1999 must be interpreted as meaning that in order to undertake an assessment as to whether the grant of the concession generates substantial revenue for the contracting authority or undue advantage for the concessionaire, it is not first necessary to establish whether the works under concession have undergone a substantial modification.

Article 30(4) of Regulation No 1260/1999 must be interpreted as referring both to physical modifications – where the works carried out are not as specified in the project approved for funding – and to modifications affecting function, it being understood that, in the case of a modification consisting in the use of works for activities other than those originally envisaged in the project submitted for funding, such a modification must be capable of significantly reducing the capacity of the operation in question to attain its designated objective.

[C-330/01 P Hortiplant](#) 33; [T-180/01 Euroagri](#) 56-59; [T-141/99, T-142/99, T 150/99 and T-151/99 Vela](#) 113

Under Article 24 of Regulation No 4253/88, the Commission must request the Member State concerned to submit comments. The beneficiary must also be given the opportunity to submit comments, but the Commission has no obligation to inform the applicant of the fact that it had given the Member State the opportunity to submit comments. It is legitimate for the Commission to repeat its checks where fresh evidence becomes available. Regulations Nos 2988/95 and 2185/96 are designed to apply on a supplementary basis to sectoral legal bases.

[C-110/13 HaTeFo GmbH](#) 39

The fourth subparagraph of Article 3(3) of the Annex to the SME Recommendation must be interpreted as meaning that enterprises may be regarded as 'linked' for the purposes of that article where it is clear from the analysis of the legal and economic relations between them that, through a natural person or a group of natural persons acting jointly, they constitute a single economic unit, even though they do not formally have any of the relationships referred to in the first subparagraph of Article 3(3) of that annex. Natural persons who work together in order to exercise an influence over the commercial decisions of the enterprises concerned which

precludes those enterprises from being regarded as economically independent of each other are to be regarded as acting jointly for the purposes of the fourth subparagraph of Article 3(3) of that annex. Whether that condition is satisfied depends on the circumstances of the case and is not necessarily conditional on the existence of contractual relations between those persons or a finding that they intended to circumvent the definition of a micro, small or medium-sized enterprise within the meaning of that recommendation.

[C-260/14 and C-261/14 Județul Neamț](#) 37, 46, 50-51, 57

The term 'irregularity' within the meaning of Article 1(2) of Regulation No 2988/95 and Article 2(7) of Regulation No 1083/2006 must be interpreted as covering not only any breach of EU law but also any breach of the provisions of national law which contribute to ensuring that EU law relating to the management of projects financed by EU funds is properly applied. Article 1(2) of Regulation No 2988/95 and Article 2(7) of Regulation No 1083/2006 must be interpreted as meaning that failure to comply with national provisions by a contracting authority, the beneficiary of Structural Funds, in connection with the award of a public contract of an estimated value below the threshold laid down in Article 7(a) of Directive 2004/18 may constitute, at the time the contract is awarded, an 'irregularity' within the meaning of Article 1(2) of Regulation No 2988/95 or Article 2(7) of Regulation No 1083/2006, if that breach has, or would have, the effect of prejudicing the general budget of the European Union by charging an unjustified item of expenditure.

The obligation to give back an advantage improperly received by means of an irregularity is not a penalty, but simply the consequence of a finding that the conditions required to obtain the advantage derived from EU rules have not been observed, so that that advantage becomes an advantage wrongly received. The fact pointed out by the referring court that the full amount to be repaid may, in any individual case, not coincide exactly with the loss actually incurred by the Structural Funds cannot alter that conclusion. Therefore the second sentence of the first subparagraph of Article 98(2) of Regulation No 1083/2006 is to be interpreted as meaning that financial corrections by Member States, if applied to co-financed expenditure under Structural Funds for failure to comply with rules concerning the award of public contract, are administrative measures within the meaning of Article 4 of Regulation No 2988/95.

The principles of legal certainty and protection of legitimate expectations must be interpreted as not precluding a Member State from applying financial corrections governed by an internal legislative measure which entered into force after an alleged breach of the rules governing public contracts occurred, provided that it is a question of the application of new rules to the future effects of situations which arose under the earlier rules, which is a matter to be determined by the national court, taking into account all the relevant circumstances of the proceedings before it.

11. DAMAGES

11.1. Conditions for non-contractual liability

[4/69 Lütticke](#) 10

For the non-contractual liability of the EU to arise, three conditions must be met:

OLAF's conduct must be unlawful, actual damage must have been suffered and there must be a causal link between the two.

[T-387/94 Asia Motor](#) 106–107; [T-56/92 Koelman](#) 21

An application seeking compensation for damage must state the evidence, from which the conduct alleged against it can be identified, the reasons for which the applicant considers that there is a causal link between the conduct and the damage it claims to have suffered, and the nature and extent of that damage.

In order to ensure legal certainty and the sound administration of justice, if an action is to be admissible the essential points of fact and law on which it is based must be apparent from the text of the application itself, even if only stated briefly, provided the statement is coherent and comprehensible.

[T-228/02 OMPI](#) 179

In the absence of any indication from the applicant, it is not for the Court to make assumptions and ascertain whether there is a causal link between the conduct complained of and the injury alleged.

[T-64/89 Automec](#) 76; [T-125/06 CSAM](#) 100

The Court has accepted that, in special circumstances, it was not essential to specify the exact extent of the damage in the application and to state the amount of compensation sought.

At the same time it has been held that the applicant had to establish, or at least indicate, the existence of any such circumstances in the application.

[5/71 Schöppenstedt](#) 11

In case if it is a legal measure that is relied on the basis for an action of the damages, it must constitute, in order to incur non-contractual liability, a sufficiently serious breach of a rule of law intended to confer rights on individuals.

[C-282/05 P Holcim AG](#) 47; [C-352/98 P Bergaderm](#) 43–44

The decisive criterion for establishing that a breach of EU law was sufficiently serious is whether the Commission manifestly and gravely disregarded the limits of its discretion. However, in all cases where the Commission has only considerably reduced or even no, discretion, the mere infringement of EU law may be sufficient to establish the existence of a sufficiently serious breach.

[T-198/95, T-171/96, T-230/97, T-174/98 and T-255/99 Comafrika](#) 138, 144; [C-352/98 P Bergaderm](#) 40

Finding of an error or irregularity on the part of the Commission is not sufficient in itself to attract the non-contractual liability of the EU unless that error or irregularity is characterised by a lack of diligence or care.

Due diligence would be breached if the Commission or its servants committed a mistake which would not have been committed in similar circumstances by an administrative authority exercising ordinary care and diligence. However, the complexity of the situations to be regulated, difficulties in the application or interpretation of the legislation and the margin of discretion available to the author of the act in question should always be taken into account.

[T-178/98 Fresh Marine](#) 118; [C-146/91 KYDEP](#) 81

It is for the party seeking to establish the EU liability to prove the existence and extent of the damage and a sufficiently direct causal link between that damage and the conduct of the Community's institution. All three main conditions have to be

satisfied otherwise the action for damages will be rejected.

[T-48/05 Franchet and Byk](#)* 182-183

However, strict application of the rule, that it is for the applicant to establish that all the conditions are satisfied, may be mitigated, where a harmful event may have been the result of a number of different causes and where the Commission has adduced no evidence enabling it to be established to which of those causes the event was imputable, although it was best placed to provide evidence in that respect, so that the uncertainty which remains must be construed against it.

[T-539/12 and T-150/13 Ziegler](#) 65

The EU can be held liable for the damage suffered by the applicants due to its lack of action only if the allegedly unlawful actions and omissions of the Commission directly caused the alleged prejudice and, accordingly, on condition that, if the measure that the applicants criticise the Commission for having failed to take had in fact been taken, the alleged prejudice would probably not have taken place.

[T-309/03 Camós Grau](#)* 157, 162

The undue accusations made by OLAF against the official in its final report on the investigation, attributing to him wrongful acts that would have rendered him liable to criminal and disciplinary action, seriously impairing his honour and reputation, constitute non-pecuniary damage justifying pecuniary compensation.

11.2. Period of limitation for damages

[C-282/05 P Holcim](#) 29-33

The possibility to bring an action for damages is limited by a period of five years, which begins with the occurrence of the event that gives rise to the liability of the EU (Article 46 of the Statute of the Court of Justice).

However, it cannot begin until all the requirements governing an obligation to provide compensation for damage are satisfied and, in particular, until the damage to be made good has materialised. Therefore, where the liability has its origin in a legislative measure, that period of limitation does not begin until the damaging effects of that measure have arisen.

This period will be interrupted if proceedings are instituted before the Court of Justice or if prior to them an application is made before OLAF (Article 46 of the Statute of the Court of Justice).

11.3. Principle of *res judicata*

[T-539/12 and T-150/13 Ziegler](#) 37, 40, 42

The principle of *res judicata* presupposes that the action alleged to be inadmissible and the action culminating in the decision having the force of *res judicata* are between the same parties, have the same subject-matter and are based on the same cause of action.

Although actions for annulment and for failure to act seek a declaration that a legally binding measure is unlawful or that such measure has not been taken, an action to establish liability seeks compensation for damage resulting from a measure or from unlawful conduct, attributable to a Community institution or body. However, the claim for damages is inadmissible when it is actually aimed at securing withdrawal of an individual decision which has become definitive and would, if upheld, have the effect of nullifying the legal effect of the decision.

12. PREVENTION

12.1. Early Warning System

Order [T-320/09 Planet](#) 37, 38, 42, 44, 94

Articles 15 to 17 and 19 to 22 of Decision 2008/969 do not only permit but also, and primarily require the authorizing officers concerned to adopt specific measures against the entity of the project concerned.

The impact of a warning about an entity in the EWS, even in the W1 category, cannot be confined within the institutions, organs and agencies of the European Union and such a warning necessarily affects relations between the authorizing officers concerned and that entity.

The reinforced monitoring measures which the authorizing officer is required to take against the entity concerned are not confined entirely to the institution internally, but are capable of having effects on the relations between that institution and the entity concerned.

A W1 warning necessarily affects the legal situation of the person concerned. Although the a warning necessarily has repercussions on relations between the authorizing officer concerned and the entity affected, this does not imply that the external effects are automatically such as to bring about a distinct change in the legal situation of the entity affected. The Court must, rather, ascertain on a case by case basis whether there is such a change.

An action for annulment is available, according to settled case law, in the case of all measures adopted by the institutions, whatever their nature or form, which are intended to have binding legal effects capable of affecting the interests of the applicant by ringing about a distinct change in his legal position (see inter alia Case 50/81 IBM v Commission [1981] ECR 2639, paragraph 9; Case C-521/06 Athinnaiki Techniki v Commission [2008] ECR I-5829 and Case C-362/08 Internationaler Hilsfonds v Commission [2010] ECRI-669, paragraph 51).

[C-314/11 P Commission v Planet](#)* (judgment of the Court of 19 December 2012) 84, 87

From the point of view of an entity registered in the system, the request for activation of a warning and the actual warning constitute a group of decisions forming a whole. (...) Planet's action, formally directed against the decisions of OLAF, must be regarded as directed also, so far as necessary, against the contested measures.

The contested measures cannot be considered to be intermediate and preparatory decisions which are not subject to review, not only because those measures had the legal characteristics of reviewable measures but also because they represented the conclusion of a special procedure.

[T-320/09 Planet](#) (judgment of the General Court of 22 April 2015) 76, 87

Respect for the rights of the defence in all proceedings which are initiated against a person and are liable to culminate in a measure adversely affecting that person is a fundamental principle of Community law which must be guaranteed, even in the absence of any specific rules concerning the proceedings in question.

Even if the EWS was developed as an internal tool, an entry in the EWS has legal consequences for the registered person concerned, meaning that the rights of the defence, including the duty to state reasons, must be upheld.

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Please note that the EWS has now been superseded by EDES.